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SUBJECT INDEX

FILE

JURISDICTION

STATEMENT OF CASE

NO. 20242

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PERMANENTE STEAMSHIP CORPORATION,  
a corporation,

Appellant,

v.

JUAN A. G. MARTINEZ,

Appellee.

BRIEF FOR APPELLANT  
PERMANENTE STEAMSHIP CORPORATION

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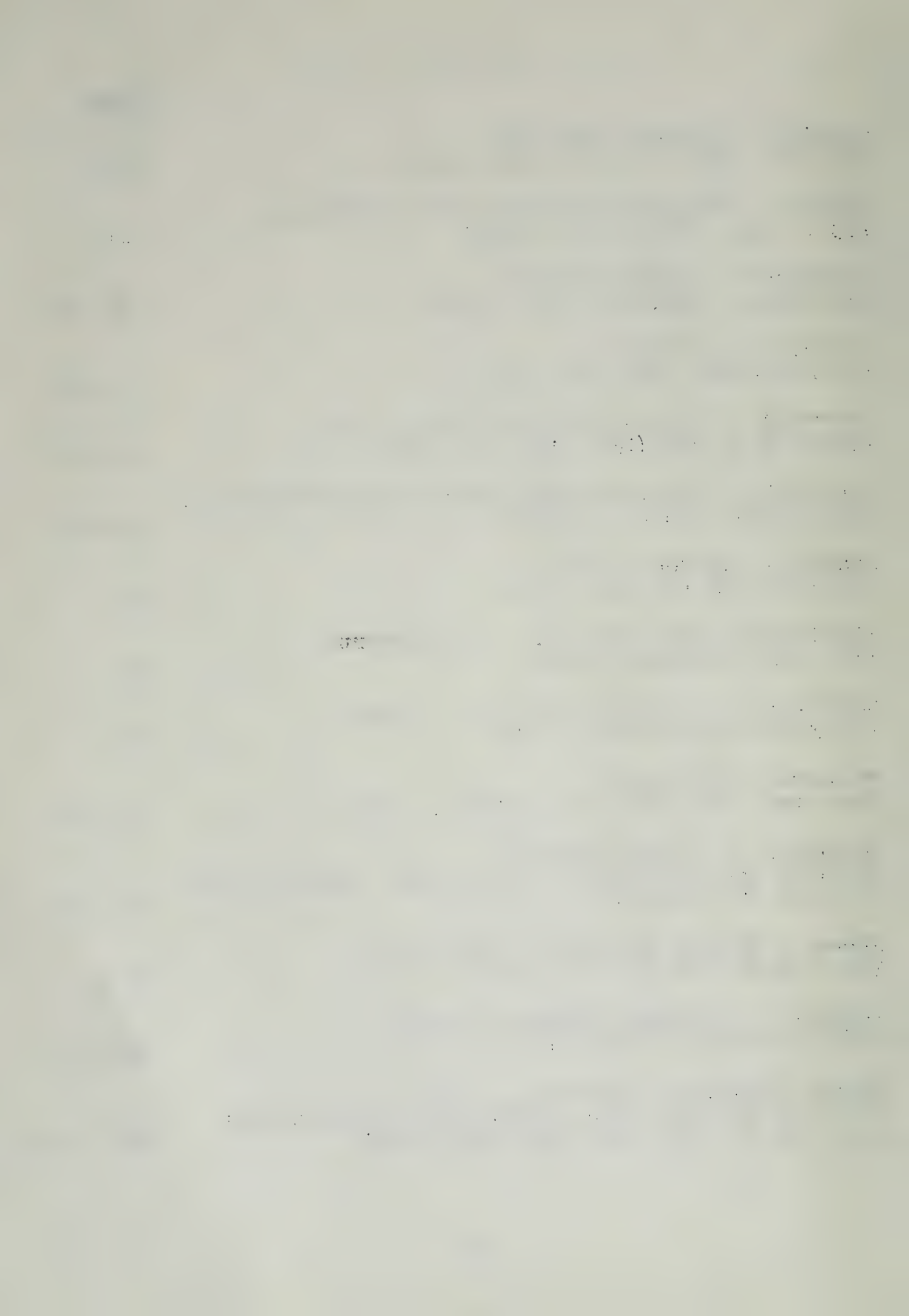
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NO. 20242

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PERMANENTE STEAMSHIP CORPORATION,  
a corporation,

Appellant,

v.

JUAN A. G. MARTINEZ,

Appellee.

APPEAL FROM THE UNITED  
STATES DISTRICT COURT  
FOR THE DISTRICT OF  
HAWAII

BRIEF FOR APPELLANT  
PERMANENTE STEAMSHIP CORPORATION

JURISDICTION

The jurisdiction of the United States District Court for the District of Hawaii was based upon Section 33 of the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), and 28 U.S.C. § 1333 (1958). The jurisdiction of this Court rests on 28 U.S.C. § 1291 (1958). The supplemental judgment herein appealed from was entered on April 12, 1965 (R.224), and the notice of appeal therefrom was filed on May 10, 1965 (R.227).



## STATEMENT OF THE CASE

### I. Proceedings Below.

This is an action against defendant-appellant Permanente Steamship Corporation (hereinafter referred to as "Permanente") for damages for injuries allegedly sustained by plaintiff-appellee Martinez while a seaman aboard Permanente's vessel the SS Permanente Silverbow (hereinafter referred to as the "Silverbow") (R.142). The "Action Under Special Rule for Seamen . . .", which was filed on August 5, 1959 (R.2) alleged that Plaintiff had been injured on or about July 24, 1957 (R.5). It set forth two counts, one under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), and the other to recover maintenance and cure in the sum of \$10,000 (R.4-7). Judgment below was for Permanente on the Jones Act count, based upon a jury verdict that neither Permanente's negligence nor the Silverbow's unseaworthiness was the cause of the Plaintiff's accident (R.166). The Trial Court, however, awarded Plaintiff maintenance and cure in the amount of \$8,534.00 in the supplementary judgment below from which this appeal is taken (R.224).

At the end of the pre-trial conference on December 18, 1963, the day before the trial started,





Permanente moved for summary judgment on the issue of maintenance and cure (Tr.E-26). At the commencement of the trial, the Court denied Permanente's motion (Tr.2a). At the close of Plaintiff's case and again at the conclusion of the evidence, Permanente moved for a directed verdict on the issue of maintenance and cure, but each time the Court denied the motion (Tr.524, 525, 748, 750).

Prior to settling instructions at a conference in chambers on December 27, 1963, the parties stipulated that the issue of maintenance and cure be withdrawn from the jury and be submitted to the Court on both the law and the facts for his determination (Tr.754). The stipulation was preserved in the Court's final judgment in favor of Permanente on the Jones Act count which was entered on January 3, 1964, reserving the issue of maintenance and cure (R.169).

Thereafter the parties submitted memoranda and argued the issue of maintenance and cure on May 26, 1964 (Tr.G-12). The Plaintiff's theory with regard to maintenance and cure had been finally established in the pre-trial order as follows:

"2) Maintenance and Cure--Due and payable from January 1961 to the date of trial at \$56.00 per week, less in-patient time in the hospital, plus hospital and





medical expenses, plus maintenance and  
cure for a reasonable time in the future  
. . . ." (R.142-143)

Permanente resisted Plaintiff's count for maintenance and cure on the following grounds: (1) Plaintiff's subsequent employment on the same and many other ships (R.177, Tr.G-32); (2) Plaintiff's certification as fit for duty by the United States Public Health Service Clinic in Honolulu on July 24, 1957 (R.184); (3) Plaintiff's failure to seek and obtain available medical relief at United States Public Health Service Clinics ( R.186, Tr.G-40); and (4) Lack of competent proof that Plaintiff's disability commencing in 1961 (long after departing the Silverbow) was proximately caused by the fall suffered aboard the Silverbow (R.191, Tr.G-43).

After the Court decided the maintenance and cure issue in Plaintiff's favor, Plaintiff's attorney served proposed findings of fact and conclusions of law. Permanente filed objections to and motion to amend the proposed findings of fact (R.213-217), but at the hearing thereon the Court refused to re-examine its decision (Tr.H-16). Thereafter, findings of fact and conclusions of law were entered and filed on March 31, 1965. They held that Plaintiff was entitled to maintenance from



January 1, 1961 through December 10, 1962, February 20, 1963 through March 2, 1963, and March 13, 1963 to December 15, 1963 in the amount of \$7,984.00 and to cure in the amount of \$550.00, for a total sum of \$8,534.00. The supplemental judgment herein appealed from was entered, and Permanente filed its notice of appeal as stated above.

## II. Facts of the Case

### A. Plaintiff's Background.

Plaintiff, a Puerto Rican, had started sailing in 1945 at the age of seventeen (Tr.178). After his discharge from Korean War duty in the Army in 1953 (Tr.177-178), Plaintiff apparently resumed his work as a seaman, and his life went on uneventfully except for a couple of arrests for drunkenness in 1954 and 1955 (Tr.725). Plaintiff testified that prior to the accident his health had been good and that he had had no sickness or injuries other than colds and measles as a child, venereal disease and a stab wound in 1950 (Tr.292, 320-321, 324-329, 725-727, Ex. P-5 & P-6).

In March, 1957, Plaintiff signed on the Silverbow as an officer's bedroom steward (Tr.181, 329). Plaintiff's living quarters were in the Messmen's Room, No. 34 where he was assigned to the upper bunk of a double decker (Tr. 182-183, 195, 671).





Another seaman living in the same room was named Awakuni. He had sailed aboard the Silverbow from February, 1957 to February, 1958, as a utility man (Tr.196, 665-666). Awakuni was the union delegate for the Steward's Department (Tr.667-668).

B. The Accident.

There is agreement that on the night of July 23 and the early morning of July 24, 1957, the Silverbow was at Pier 30 in Honolulu (Tr.195, 335, 674, Ex.P-13) and that Plaintiff was still employed by Permanente as a seaman on the ship (R.144). Beyond that there is conflicting testimony concerning how and when the accident occurred. On various occasions Plaintiff, himself, told several different stories as to how the accident occurred.

Awakuni, the union delegate, testified that when he returned to the Silverbow between 12:00 midnight and 12:30 a.m., July 24, 1957 (Tr.674-675, 684) Plaintiff was not in his bunk (Tr.704); there was no one in the room (Tr.675-676). Awakuni went to bed and to sleep (Tr.676). He was awakened by a noise (Tr.674, 692) and put his light on. He saw Plaintiff walking around the room (Tr.674 but see Tr.692 and 710-711). Plaintiff told Awakuni that he fell from his bunk (Tr.676-677). Awakuni then got up and helped Plaintiff get into his bunk, pushing him up by the



buttocks (Tr.678, 679, 705-706). Awakuni then put his light out and went back to sleep (Tr.678-679).

Awakuni testified that the next morning when he talked to Plaintiff, he saw a small cut and some crusted blood right on top of Plaintiff's head and told him to get a Master's certificate, a document authorizing Plaintiff to go to a U.S. Public Health Service clinic, and have the cut checked (Tr.679-681). Also that morning, Awakuni saw a small spot of blood on the floor of the Messmen's Room (Tr.695-696). Plaintiff never did tell Awakuni how he injured his head (Tr.684-685, 696). Awakuni did not see Plaintiff fall (Tr.690, 707, 708, Ex.P-15).

Captain O'Brien, the Master of the Silverbow, testified that on the morning of July 24, 1957, Plaintiff came into his office from the direction of the purser's office. Captain O'Brien described his conversation with the Plaintiff in his letter dated July 29, 1957 as follows:

"I asked him how it happened and he just shrugged, smiled and said 'Fell out of the bunk, the upper bunk, just rolled over and wham, fell out.'" (Ex.P-13 and see Tr.444, 455-456, 517)

Plaintiff told the purser, however, that he fell off a chair trying to crawl into an upper bunk (Tr.517, Ex.D-1). Plaintiff's signed statement in his own words in Permanente's report of injury is:





"There is no ladder by which I can climb into my upper bunk, and I fell off the chair trying to crawl up into it, and hit the edge of the bunk below with the top of my head as I fell. Dave Awakuni, messman, helped me up. Signed: Juan G. Martinez" ( Ex.D-1, Tr.356)

Captain O'Brien, in his letter dated July 29, 1957 which transmitted the report of injury to Permanente noted the difference between what Plaintiff told him and Plaintiff's signed statement in the report of injury (Tr.444-445, 446).

When Plaintiff was deposed on behalf of Permanente on July 20, 1960, he introduced a third version of how the accident occurred. He testified at this time that on the night of the accident, he was trying to get up and go to the bathroom and he bumped his head on a small shelf which was attached to the bulhead over his bunk. Immediately thereafter, he bumped his head again--this time on the ceiling (Tr.343-344, 347, Ex.D-7). He then fell from his bunk and hit his head a a third time on the deck, knocking himself out (Tr.345-346, 347, Ex.D-7). At this time he said that the lack of a ladder had nothing to do with the accident at all (Tr.358-359, Ex.D-7).

At the trial, Plaintiff presented a fourth version of how the accident happened. Plaintiff testified that on July 23, 1957, after finishing work about 5:00 p.m., cleaned up and about 6:30 p.m. went to his bunk and started reading. He testified as follows: He fell asleep about 8:00 p.m. and that at 11:30 p.m. he woke up because he wanted to go to the toilet. H



was lying on his back. He raised his head and hit the crown of his head on the corner of the shelf that was projected from the bulkhead above his bunk and was knocked unconscious (Tr.196, 202, 336-341, 347). He did not hit his head on anything else (Tr.341-342). The next thing he remembers is waking up on the deck and Awakuni picking him up (Tr.196-197, 202-203, 344-345, 347). Plaintiff was groggy at the time and his head and back hurt (Tr.196-197, 202-203, 347, 349). He asked Awakuni, "Who hit me?" Awakuni replied, "Nobody hit you; you fell out of the bunk; you hit the deck." (Tr.196-197, 241, 350). Awakuni wiped the blood from his face and head and put him in a lower bunk while he went to get the purser (Tr.196-197, 347-348, 350, 351). After Awakuni put him in the bottom bunk, Plaintiff lay down and either went to sleep or passed out (Tr.204-205, 348). He did not go to the bathroom (Tr.351). He testified that he didn't remember anything else until the next morning (Tr.349). He also testified, however, that when Awakuni returned to the room he did not bring the purser with him (Tr.199).

At trial Plaintiff denied that he had gone up to a bar in Honolulu and come back to the room around 1:00 in the morning (Tr.385).





Plaintiff testified that the next morning he first saw Awakuni in the passageway outside the Messmen's Room. Awakuni told him to go see the Captain (Tr.360-361). He went to see the Captain and told him about the accident (Tr.205, 264). He told the Captain that he bumped his head on the shelf, got knocked out and fell out of the bunk (Tr.264, 355, 363). Plaintiff also testified that he told Awakuni that he hit his head on the shelf (Tr. 363-364) and that he had never given a different explanation of the fall than that (Tr.354). He claimed that the statement in the report of injury merely embodied the purser's idea of how the accident happened (Tr.355-357, 359-360, 364, 382). Plaintiff also testified that the text of the report of injury indicating that the accident happened on 24 July, 1957 at 1:00 a.m. was a mistake (Tr.382-383) and that the text that he first reported the fall to the purser at 8:00 a.m. the next morning was "a lie" (Tr.381).

Permanente's expert testified that there was adequate lateral clearance in the bunk for Plaintiff to sit up without touching the shelf (Tr.630-634, 637-638, 648-649). Plaintiff's expert admitted that



Plaintiff would not hit the center of his head on the shelf if he sat straight up, unless he had been lying on the bunk at an angle (Tr.738-739).

With regard to the time that the accident occurred, Awakuni's testimony indicated that it happened some time after he came back to the ship and went to bed between 12:00 and 12:30 on the morning of July 24, 1957 (Tr.674). Permanente's report of injury indicated that it occurred at 1:00 a.m. (Ex.D-1). Plaintiff testified repeatedly that the accident "must have happened" at 11:30 p.m. on July 23, 1957 (Tr.196, 338, 351, 352, 382-383, 385). Plaintiff also testified, however, that he never looked at the clock in the Messmen's Room (Tr.351-352, 386).

C. Events During the Day on July 24, 1957.

Plaintiff testified that the morning after the accident he had a pain in his back and head (Tr.205). He testified that he went to see the Captain and showed





him his head injury (Tr.205, 264) and told him that his back and neck hurt (Tr.264, 355). The Captain, however, testified to the contrary (Tr.441-442, 447-448). The Captain told him that he needed medical attention and that he should go to the Public Health Service (Tr.206-207, 264).

Plaintiff testified that at the Public Health Service he was placed on a gurney (Tr.264), where he passed out for a few minutes (Tr.207, 264). A nurse shaved his head, and the doctor said that stitches could not be used to close the cut because it was already old; so some kind of clip or tape was used instead (Tr.207, 264, 361-362). Plaintiff testified that the doctor told him to go back to the ship (Tr.208-209) and told him to rest awhile (Tr.264). He returned to the ship (Tr.362).

The abstract from the clinical record of the U.S. Public Health Service Clinic in Honolulu concerning Plaintiff's visit states:

"2. [EXAMINATION] Laceration vertex--  
superficial. Vision normal. Extra-  
ocular movements and neurological  
examination normal."

(Ex.D-4a)

The U.S. Public Health Service found that Plaintiff's



condition on discharge was "fit for duty" (Ex.D-4a).

D. Remainder of 1957.

Plaintiff testified that after the ship sailed from Honolulu he got sick for three days with fever (Tr. 209). He had pain in his back and his head (Tr.265-266). He did not see the purser, however, until four or five days after the accident when the purser brought the report of injury down for him to sign. He testified that he complained to the purser about his neck hurting, his back and headaches and that the purser gave him pills (Tr.265). He testified that about twelve to fifteen days after the accident he had an attack of dizziness, blurring of vision, pain in his head or neck and numbness in his arms and legs, so that he had to go back to his room and lie down for 30 to 45 minutes (Tr.209-210, 211, 265-266), and that this was when he started having headaches and dizzy spells (Tr.365). He also testified, however, that the numbness in his arms and legs started one or two months after the accident (Tr.365-366). He testified that he continued to go to the purser for pills (Tr.213-214, 265-266) and that when the vessel was in port he would get pills from druggists for his symptoms (Tr.214-215).



Captain O'Brien testified that Plaintiff did not make any complaints to him concerning his physical condition during the remainder of his stay aboard the Silverbow. He also testified that to his knowledge Plaintiff made no complaints concerning his physical condition to the purser or any other officer (Tr.461).

Plaintiff continued to work aboard the Silverbow for over four months after the accident until December 12, 1957 (Tr.212, 266-267, 362-363, 517 Ex.P-11). He left the ship of his own accord. He was not given a medical discharge from the ship and he did not ask for a Master's certificate (Martinez' deposition 35-36). There is no evidence that he asked for maintenance and cure at this or any later time until this action was filed.

E. Continuation of Maritime Employment  
Until January, 1961.

After leaving the Silverbow in December, 1957, Plaintiff worked on many other ships until he finally stopped work in January, 1961 (Tr.215, 362-363). A summary of Plaintiff's employment during this period is as follows:

1958

SS Hawaiian Rancher	4 months
SS President Jefferson	3 months
SS P & T Explorer	3 1/2 months





1959

SS Filmore	3 months
SS Hawaiian Trader	3 months

1960

SS Matsonia	2 1/2 months
SS Coast Progress	3 1/2 - 4 months
Ship chartered by Matson	4 months
SS Monterey	1 month (December)

1961

SS Monterey	1 month (January)
-------------	-------------------

(Tr.267-277, R.122-124)

There is no evidence that Plaintiff's above maritime employment was other than voluntary.

Plaintiff testified that at various times during this period he had the following symptoms which he believed to be related to the accident: Headaches, a spot of pain in the neck, a sore back, nervousness, confusion of mind and spells characterized by dizziness, blurring of vision, numbness and weakness in the arms and legs and a feeling in the mind as though something were slipping from it (Tr.267-281).

Three or four weeks after leaving the Silverbow he registered at the Union Hall in Honolulu and shipped out again on the Hawaiian Rancher (Tr.267-268).



On March 14, 1958, while aboard the Hawaiian Rancher, Plaintiff lacerated the tip of his right thumb. He had emergency out-patient care and on March 17, 1958 commenced a series of five out-patient visits to San Pedro Public Health Service Clinic which continued until April 11, 1958. The San Pedro Health Service records of those visits contain no reference to any of the symptoms which Plaintiff testified that he was having during this period (Ex.D-4b - D-4h). Plaintiff's own testimony establishes that he did not complain of these symptoms on this occasion (Tr.369-370).

Plaintiff testified that in 1960 when he was working aboard the Coast Progress he did complain about the numbness in his arms and legs; so the purser gave him a Master's certificate to go to the U.S. Public Health Service Clinic in San Pedro (Tr.274). He went to the clinic and was seen by Dr. Jordan. This was the first time since July 24, 1957 that he had seen a doctor for the conditions that he thought resulted from the accident. This was just about two weeks before his deposition in this case and approximately three years from the date of the accident (Tr.369-370, Martinez' deposition 29-30). Up to this time the only medical

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treatment that the Plaintiff had obtained for these conditions were aspirin-type and anacin-type pills that he had gotten from the pursers aboard ship and from drug stores, which he testified were generally ineffective.

The San Pedro U.S. Public Health Service

Clinic records of this visit state:

"6-27-60 Complains of vague pains and 'dead sensations' in right ankle, right knee, right wrist, fingers and toe. These sensations come and go, in between episodes he is symptom free. Describes no redness or swelling. Exam of areas mentioned is not remarkable. Patient wants x-rays of knee and ankle. X-rays right knee and ankle--negative.

Impression, possible arthralgia anxiety.  
DNP(?) sodium salycilate.

Fit for duty.

Signed: Jordan"  
(Exs. D-4b - D-4h)

During this visit, Dr. Jordan advised Plaintiff to see a specialist. He was supposed to go on the following day (Tr. 371-372, Ex. D-7). Plaintiff, however, did not see a specialist at that time (Tr. 371-372). Dr. Jordan gave Plaintiff some red capsules for his legs and told him that when the pain and numbness came he should take the pills and sit down. Plaintiff argued with Dr. Jordan that if he sat down, he would be fired. He testified that he left the Coast Progress because he



did not want to be fired from the ship when he had a dizzy spell and had to sit down. He flew home (Tr. 371-372).

On October 22, 1960, Plaintiff was examined by Dr. Rowlin Lichter in Honolulu (Tr.142). Dr. Lichter found Plaintiff to be well built, muscular, jovial and more or less outgoing (Tr.145, 172). In giving his history to Dr. Lichter, Plaintiff stated that since two weeks after the original injury in 1957 he had had headaches which were relieved by aspirin-type and anacin-type drugs off and on which were generally getting a little bit better over the years but had been more or less static for several months (Tr.143-144). He also stated that he had episodes of numbness on the little finger side of his forearm, low backache occasionally radiating into the right leg, with some numbness just above the knee and in the lower half of the left shin bone in front (Tr.144-145). It does not appear that he mentioned to Dr. Lichter his claimed blurring of vision, dizziness, mental sensations and confusion of mind.

Plaintiff testified that while he was aboard the Monterey in December, 1960 and January, 1961, his symptoms recurred and that he was confused and could



not think clearly, so he left the ship and flew home in January, 1961 (Tr.277-279). It does not appear that Plaintiff obtained a Master's certificate when he left the Monterey.

F. Claimed Period of Disability.

Plaintiff testified that when he got home, his wife took him to a Dr. Rosenberg, to the neighbors and also to some kind of temple. He testified that as time passed he was nervous and couldn't go any place. His wife took him to San Diego County Hospital (Tr.279).

In 1962, Plaintiff was involved in an incident in the local welfare office. A man there claimed that Plaintiff hit him over the head with a telephone. As a result he was convicted of assault and sentenced to 30 days (Tr.379-380).

Plaintiff testified that shortly thereafter in 1962 he was taken to the psychiatric ward of San Diego County Hospital and subsequently declared mentally ill by Judge Glenn apparently on the testimony of his doctors and his wife. Thereafter he was sent to Patton State Hospital where he was treated for about three months (Tr.282-283, Exs.P-5 and P-6). In San Diego County





Hospital and Patton State Hospital, there were two different diagnoses of Plaintiff's problem, depressive psychosis and paranoid schizophrenic psychosis (Tr.232-233, Exs.P-5 and P-6). Prior to being released from Patton State Hospital, Plaintiff admitted to a doctor there that some of the petition (blackouts, etc.) was falsified to insure his getting in the hospital (Tr.122, Exs.P-5). At trial Plaintiff denied having said this (Tr.373). One of Plaintiff's witnesses, Dr. Low, testified that it was his opinion that the petition was in fact true and that Plaintiff's statement that it was falsified was itself a falsification made because Plaintiff wanted to get out of the hospital (Tr.124-215). At trial Plaintiff testified, however, that he did not know what blackouts were, unless that was the doctors' name for his spells of numbness in the arms and legs, etc. (Tr.368-369).

After three months in Patton State Hospital, Plaintiff was released on out-patient family care and given certain medication (Tr.283). He was still on the same medication at the time of trial (Tr.286-287). Plaintiff testified that at the time of trial, his principal present symptom was sleeplessness (Tr.300-301).



G. Medical Testimony.

The Court stated in its findings that the condition which disabled Plaintiff was "a form, at least, of mental illness, whatever it may be called", and subsequently referred to it as "at least a mental illness, whether it be called a post-concussion syndrome or organic psychosis, or by some other name" (R.208). The principal witnesses concerning Plaintiff's conditions possibly included in the above finding were Dr. Low, a psychiatrist, and Dr. Hunter, an uncertified specialist in neuropsychiatry, for Plaintiff and Dr. Cloward, a neurosurgeon and neurologist, for Permanente. None of these doctors appear to have been treating physicians.

1. Dr. Low (Plaintiff's witness). Dr. Low took Plaintiff's history from Plaintiff himself and from the records of Patton State Mental Hospital (Tr.41). He admitted, however, that Plaintiff gave only a list of his symptoms, not a chronology (Tr.113). Dr. Low also admitted that the hospital records indicated that Plaintiff's wife gave the information to the hospital historian (Tr.113). An objection was made to any opinion testimony by Dr. Low, a non-treating physician (Tr.32-33), that was not given in response to a hypothetical question, but the objection was overruled (Tr.35). Dr. Low went on to testify that based





on his assumption from the medical records and from Plaintiff's assertions at the examination, that prior to the injury he had been a very hard worker, outgoing, cheerful, and able to support his family adequately, it was his diagnosis that Plaintiff had suffered a post-traumatic personality disorder (Tr.44). Dr. Low explained that the blow hindered Plaintiff's ability to cope with all the stresses that are present in today's world and made him fearful, which resulted in psychosomatic symptoms (Tr.44-45, 47). Dr. Low testified that the injury triggered a mental condition which may have been latent or dormant; and but for the injury might not have appeared as yet (Tr.48). Dr. Low had had another doctor give Plaintiff a battery of psychological tests to help confirm his medical opinion (Tr.53), but the other doctor did not testify and the records of the test results were neither offered nor admitted in evidence.

At the close of direct examination, Dr. Low was asked a long hypothetical question which included the following language:

" . . . that his injuries from the fall resulted in cerebral concussion, head and brain injuries, lacerations of scalp; back injury, nerve root involvement, and probably compression fracture of C-6 and -7 cervical region; nervousness; psychiatric disability and mental disorder.

\* \* \*



"I'm going to ask you, Doctor, to also assume the following facts: That he had been examined by doctors whose reports, findings, and opinions you have read, to wit: Dr. Rowlin Lichter, Dr. Maurice Silver, Dr. William Rhorer, Dr. Ralph B. Cloward, the U.S. Public Health Service Out-Patient Record, X-ray by Dr. George W. Henry, San Diego County General Hospital records, and Patton State Hospital Records . . . I am going to ask you, Doctor, do you have an opinion, based on a reasonable degree of medical certainty, as to whether or not there is a causal connection or relationship between the accident sustained by Juan A. G. Martinez on July 23, 1957, as I have described, and the medical findings--that is, whether the injuries as stated were the competent producing cause of his mental disorder? First of all, Doctor, do you have an opinion?" (Tr.76-78).

The question was objected to on the grounds that the assumptions included facts that had not yet been proven and that the assumptions included the very conclusions for which the questions asked (Tr.74). The question was allowed subject to a motion to strike (Tr.75). After satisfying himself that the assumptions included Plaintiff's prior good health, Dr. Low testified that the accident was a competent cause of Plaintiff's present condition (Tr.78-79). Dr. Low subsequently testified that in the course of his examination of Plaintiff he had perused all the medical records made available to him, and that his opinion testimony was based on the substance of those records, to a degree



(Tr.97-98). Among the letters and reports to which he referred were a letter from a Dr. Rhorer dated August 9, 1960, letters from a Dr. Silber dated July 3, July 7 and October 7, 1963 and a letter to Plaintiff from his social worker from Patton State Hospital written in Spanish (Tr.101-103). Dr. Rhorer's report and one of Dr. Silver's reports were admitted in evidence not to prove the truth of the matter set forth therein, but, only for the purpose of including in the record the document to which the doctor referred (Tr.103-107, Exs.D-12 - D-13).

Dr. Low testified that he gave particular weight to the Patton State Hospital records (Tr.118-119). He also testified that Plaintiff told him that he had had blackouts and that blackouts would be significant because they are abnormal and a feature of a psychotic personality, an escape mechanism, an anger or rage reaction in this case (Tr.114-115, 119). He admitted that if the blackouts had not occurred, his opinion would be changed to a degree (Tr.119).





2. Dr. Hunter (Plaintiff's witness). Dr.

Hunter examined Plaintiff during the course of the trial (Tr.223). He took a history from Plaintiff, performed a neurological examination and conducted a psychiatric evaluation on him (Tr.225-228). It was his diagnosis that Plaintiff was showing the classical symptoms of a post-concussion syndrome (Tr.228). He also testified, however, that the symptoms of post-concussion syndrome are all subjective (Tr.243-244). Dr. Hunter testified that he had received and read all of the medical reports written in the case and the records of San Diego County General Hospital and Patton State Mental Hospital. Dr. Hunter was asked the following hypothetical question:

"Q Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, taking into consideration your findings in your examination and the medicals that you read, the reports, hospital records, as to whether or not there is a causal relationship between the episode which you have described on July 23, 1957, and the resulting conditions today? Is there a causal connection?" (Tr.235).

The Court had previously stated with regard to the testimony of Dr. Hunter:

"THE COURT: Very well. In line with the discussion in chambers informally, and over the objection of Counsel for the Defendant, which I can well under-



stand, but in view of Dr. Hunter's having to go back to the Mainland, the Court will again make a special ruling, subject to the same cautions and limitations I have stated heretofore with respect to the other two witnesses, and allowing this witness, the Plaintiff, to be withdrawn, and this witness to be substituted out of order, subject, of course, to the conditions I have stated before of any substantiating -- of substantiating all assumptions of fact upon which any expert opinions are allegedly based; and Counsel undertaking to prove by competent and substantial evidence all of the bases upon which the alleged opinions rest, all of the substantial facts and allegations upon which they rest.

"Very well. All objections heretofore made with respect to the other witnesses are preserved, are to continue and preserve the position to strike in the manner as the other witnesses' testimony, the other expert witnesses." (Tr.219).

Thereafter Dr. Hunter testified that there was a causal relationship between the original injury and the present post-concussion syndrome (Tr.235).

Dr. Hunter testified that his opinion, previously formed, had been strengthened by many of the doctors' reports he read. He testified that the opinion given in Court was based on all of the things he had observed (Tr.239-240).





3. Dr. Lichter (Plaintiff's witness). Dr. Lichter, the orthopedic surgeon who had examined Plaintiff in October, 1960, and subsequently, testified largely concerning certain cervical vertebra and nerve root problems (Tr.147-162) which were not incorporated into the Court's findings. He testified briefly concerning concussion and post-concussion syndrome (Tr.160-162). A hypothetical question which was substantially identical to the one asked of Dr. Low was put to Dr. Lichter concerning the causal relationship between the accident and Plaintiff's physical injuries (Tr. 167-169). The hypothetical was objected to on the same grounds as the objection to Dr. Low's hypothetical and in particular on the ground that it assumed its own conclusion (Tr.169-170). It was admitted subject to a motion to strike (Tr.170). Dr. Lichter testified that the concussion, brain injury, other physical injuries and some degree of nervousness could be ascribed to the 1957 injury (Tr.170). Dr. Lichter also testified that he was not treating Plaintiff (Tr.174-175).

4. San Diego County General Hospital and  
Patton State Hospital Records.

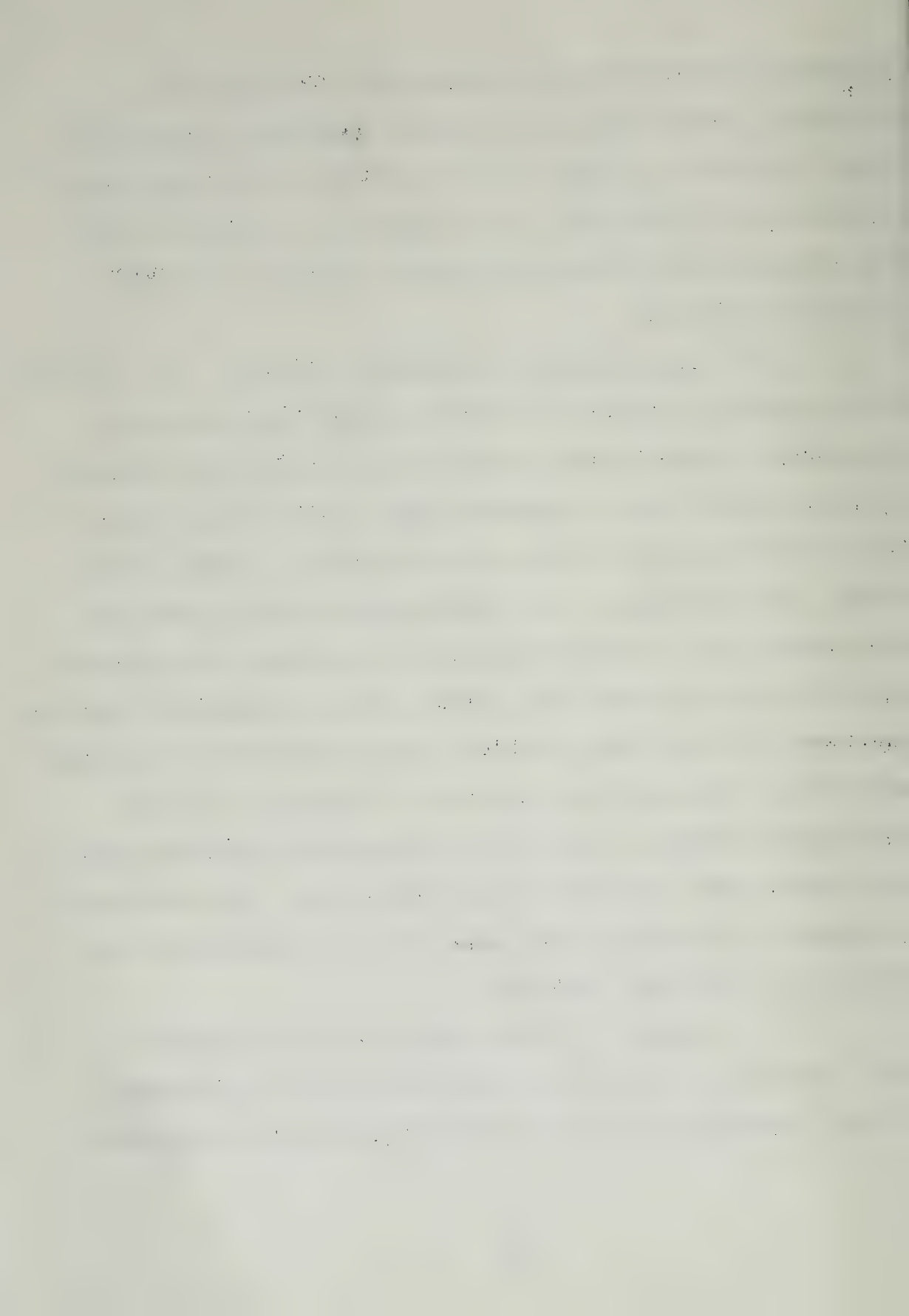
The San Diego County General Hospital (Ex.P-6) and Patton State Hospital records (Ex.P-5) were offered in evidence by Plaintiff (Tr.508, 514). They were ob-



jected to by Permanente on the grounds that there had not been a proper showing of causal connection between the facts set forth in those records and the accident involved in the case (Tr.519-522). The objection was overruled and the records were allowed in evidence subject to a motion to strike (Tr.522).

5. Dr. Cloward (Permanente's witness). Dr. Cloward first examined Plaintiff on July 1, 1963, when requested to perform a neurological examination to determine evidence of brain injury from a reported head injury (Tr.532-533). He had reviewed all of the x-rays during the course of the trial. On the basis of his examination and his review of the x-rays and a lengthy hypothetical question, he expressed the following opinions: The x-rays did not suggest the cervical vertebra and nerve root problems concerning which Dr. Lichter testified. Plaintiff did not have a concussion or post-concussion syndrome because the headaches and dizziness did not appear until two weeks after the injury. Plaintiff had no organic psychosis at the time that Dr. Cloward saw him (Tr.535-536, 540-549, 554-556).

6. Motions. At the close of the Plaintiff's case, Permanente moved for a directed verdict with regard to the conditions to which Plaintiff's doctors testified on



the grounds that they had not been shown by competent evidence to have resulted from the accident and moved to strike the testimony of the three doctors (Tr.524-525). At the close of the entire case, Permanente's motions for directed verdict were renewed, and Permanente moved again that the testimony of Dr. Low, Dr. Lichter and Dr. Hunter be stricken on the grounds that the hypothetical questions were faulty and that causation was not established with regard to the symptoms concerning which the doctors testified. The motions were denied (Tr.525). Permanente also moved that the hospital exhibits from Patton State Hospital and San Diego County General Hospital be denied admission in evidence, or if they had been admitted, that they be stricken on the ground that causation had not been established since the hypotheticals had not been properly framed (Tr.748-749, 751). The Court denied the motions saying:

"I'm frank to say, Mr. Sampliner, that I am gravely concerned about the form of the hypothetical questions; but I allowed them in at the time, and I think the best thing to do is to proceed to the jury, and then re-examine them, and I am sure they will be given occasion to do by proper motions.

"So I will deny all motions at this time." (Tr.749-750, 751-752).





### SPECIFICATIONS OF ERROR

1. Denial of motion for summary judgment on issue of maintenance and cure.
2. Denial of motions for directed verdict on issue of maintenance and cure at end of Plaintiff's case and at close of evidence.
3. Denial of motions at end of Plaintiff's case and at close of evidence to strike testimony of Dr. Low, Dr. Lichter and Dr. Hunter.
4. Overruling of Permanente's objections to and denial of Permanente's motion to amend Plaintiff's proposed findings of fact and conclusions of law.
5. Entry of findings of fact that were clearly erroneous.
6. Entry of erroneous conclusions of law.
7. Entry of the supplementary judgment awarding Plaintiff \$8,534.00 as and for maintenance and cure.

### SUMMARY OF ARGUMENT

Permanente's obligation to provide maintenance and cure to Plaintiff was terminated as a matter of law by Plaintiff's voluntary continuation of maritime employment on numerous vessels subsequent to the accident and by Plaintiff's refusal, failure, and delay in seeking available medical attention for the conditions which he claims resulted from the accident (Specifications of Error 1, 2, 4, 6 and 7).



The Trial Court's finding of fact that the accident caused Plaintiff's illness was erroneous because all medical testimony concerning the causal relation between the accident and the illness was incompetent, because (1) the hypothetical questions concerning causation put to all three doctors improperly requested that they assume the very conclusions for which they were being asked and because (2) the doctors' opinion testimonies were improperly based on assumed material facts not then and thereafter proved, other experts' opinions and Plaintiff's statements of his history and past subjective complaints on examinations made for the purpose of qualifying non-treating doctors to testify (Specifications of Error 2-7).

The Trial Court's finding of fact that the accident caused Plaintiff to suffer a mental illness was clearly erroneous because against the manifest weight of the evidence (Specifications of Error 4-7).





## ARGUMENT

### I. PERMANENTE'S OBLIGATION TO PROVIDE MAINTENANCE AND CURE WAS TERMINATED BY PLAINTIFF'S VOLUNTARY CONTINUATION OF MARITIME EMPLOYMENT ON NUMEROUS VESSELS SUBSEQUENT TO THE ACCIDENT.

Uncontradicted evidence that Plaintiff voluntarily worked aboard the Silverbow and many other ships from the date of the accident until January, 1961, has been before the Court throughout this case: In the form of Plaintiff's answers to interrogatories (R.122-124) prior to the beginning of the trial and in the form of Plaintiff's own testimony (Tr.212, 215, 266-279, 362-363) and his wage records showing his service aboard the Silverbow (Ex.P-11) thereafter. Indeed the Court's findings of fact entered along with the conclusions of law state:

"4. That the plaintiff continued to work aboard the SS Permanente Silverbow and on other vessels owned by employers other than the present defendant for various periods until January, 1961." (R.222)

There was no evidence that Plaintiff's continuation of maritime employment was not voluntary.

The Court's supplementary judgment awarded Plaintiff \$8,534.00 for maintenance and cure for periods beginning after Plaintiff left his last maritime employment (approximately 3 1/2 years after the accident) until the date of trial. Permanente contends that all of the rulings described in Specifications of Error 1, 2, 4, 6 and 7 were erroneous be-



cause its obligation to provide maintenance and cure in this case was terminated by Plaintiff's continuation of maritime employment on numerous vessels after the accident and that, therefore, Permanente is entitled to a reversal of the supplementary judgment herein and an award of judgment on appeal.

No case was found in which this honorable Court has ruled upon this issue, but the Court of Appeals for the Sixth Circuit held in Inter Ocean S.S. Co. v. Behrendsen, 128 F.2d 506 (6th Cir. 1942), that a seaman could no longer claim maintenance and cure for an intestinal ailment due to contaminated drinking water furnished by the shipowner, where, after having been discharged from the hospital, he resumed his work as seaman on the same and other vessels, even though he claimed that after this time he made substantial expenditures for medical care without which he could not have performed the duties incident to his subsequent employment. The Court of Appeals stated:

"The duty that develops upon the owner embraces medical care, nursing, and attention in order to effect a cure so far as that may be possible, Whitney v. Olsen, 9 Cir., 108 F. 292, 293, 297, and the obligation does not end with the voyage. It is clear, however, from the holding in Calmar v. Taylor [303 U.S. 525, 82 L.Ed. 993 (1938)] and from the very nature of the concept of maintenance and cure, that the owner's obligation has been discharged when the seaman has successfully reentered gainful employment.\*\*\*" (At 508)



The District Court for the Southern District of New York came to a similar conclusion in Wilcox v. United States, 32 F.Supp. 947 (S.D.N.Y. 1940). In that case two members of the ship's crew were assaulted by two other members, but both of the former stood their regular watches and received their regular pay to the end of the voyage, and were given medical assistance at the end of the voyage but neglected to continue treatment at a hospital. It was held that under the circumstances maintenance and cure could not be awarded to either, even though medical evidence indicated one had a tenderness in the groin indicating a potential hernia.

To the same effect is The Ball Brothers, 35 F.2d 261 (W.D.N.Y. 1929), in which the court held that libellant was not entitled to maintenance and cure because he continued work on other vessels after the accident and did not present himself for medical attention. See also Brailas v. United States, 79 F. Supp. 963 (S.D.N.Y. 1948), in which the court dismissed a claim for maintenance and cure where it appeared that the libellant returned to maritime work within six months after the accident.

That a return to maritime employment terminates the shipowner's obligation to provide maintenance and cure





is indicated by the statement of the rule in 1 Norris, Seamen, § 561 (2d Ed. 1962):

"Continuance of employment whether aboard the vessel upon which the seaman had become ill or injured or employment on other ships or other employment will result in terminating payments of maintenance and cure."

In Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 82 L. ed. 993 (1938), cited by the Court of Appeals for the Sixth Circuit in Behrens, the Supreme Court recognized that the shipowner's duty to provide maintenance and cure to a seaman falling sick or becoming injured in the service of the ship may extend for a fair time after the voyage. It held, however, that the shipowner is not bound to an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease. In explaining its holding the Supreme Court reviewed the nature of maintenance and cure, (upon which the Court of Appeals also relied in the Behrens decision,) finding it to be a duty which arises from the contract of employment and does not rest upon negligence or culpability upon the part of the Master and is not restricted to those cases where the seaman's employment is the cause of the injury or illness. It can be seen from this that maintenance and cure is not a legal mechanism for shifting loss based



either on the theory that the party at fault should pay or on the theory that a profit-making enterprise causing a loss should pay. This was noted by the Supreme Court which expressly stated in the Calmar decision that maintenance and cure is not an award of compensation for disability suffered. Instead it is an implied obligation arising from the seaman's contract of employment with the shipowner.

The nature of the owner's obligation for maintenance and cure as recently stated by the U. S. Supreme Court is as follows:

"Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." (Emphasis added.) Vaughan v. Atkinson, 369 U.S. 527, 531, 8 L. ed. 2d 88, 92 (1962).

The duration and extent of the owner's obligation is best determined by examining the purposes thereof. In this regard the Supreme Court in the Calmar decision summarizes those purposes as follows:

"The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in Harden v. Gordon, Fed.





Cas. No. 6047 (C.C.): the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." (303 U.S. 528)

That the obligation for maintenance and cure should terminate completely with the voluntary resumption of maritime employment is borne out by measuring that rule against the classic reasons for maintenance and cure as indicated by Mr. Justice Story. First, does the rule provide adequate protection for seamen from the hazards of illness and abandonment while ill in foreign ports (or domestic)? It does. Having voluntarily resumed subsequent maritime employment, the seaman comes under the umbrella of the maintenance and cure obligation of his subsequent employer. This protection extends even to recurrences of prior illnesses, injuries or conditions. It was recognized in the case of Nielson v. The Laura, Fed. Cas. No. 10092 (D.C. Calif. 1872), that a seaman's sickness need not originate during the voyage to entitle him to maintenance and cure. The only prerequisite in this regard was that it occur--



or recur--during the voyage, without misconduct on his part. And this protection would continue if needed until still another maritime employment had been undertaken by the seaman.

Does the rule provide inducement to masters and owners to protect the safety and health of seamen while in service? This can best be answered by saying that it does not detract from the existing inducement to masters and owners in that regard. And conversely extending the obligation of maintenance and cure of the prior employer will not add to the pre-existing inducements to that employer and his master to take greater steps to protect the health and safety of their seamen. Neither the prior employer nor his master have any way of knowing in advance whether a particular unsafe or unhealthy condition on the vessel will disable a seaman in such a way that, notwithstanding the injury, he will be able to work again in maritime employment. The prior employer and his master do not know what the future of the prospectively disabled seaman is going to be. They must, therefore, protect his health.

Finally, does the rule serve the purpose of building up the merchant marine by inducing men to accept



employment in it? It does, in the same manner that it provides protection for seamen, that is by maintaining a continuous umbrella of maintenance and cure over them from one maritime employment to another.

The most recent policy pronouncement of significance by the U. S. Supreme Court dealing with maintenance and cure is Vaughn v. Atkinson, 369 U.S. 527, 8 L.Ed.2d 888 (1962). That case held that a seaman's recovery for maintenance and cure is not reducible by the amount of his earnings from non-maritime employment during the period before he reaches maximum medical recovery. It may be contended that Vaughn v. Atkinson and the Third Circuit case of Loverich v. Warner, 118 F.2d 690 (3d.Cir. 1941), are authority for the proposition that a seaman's right to maintenance and cure is not finally terminated by subsequent maritime employment on the same and other ships. These cases are distinguishable. Apparently neither case involved a voluntary resumption of maritime employment. The seaman in Vaughn v. Atkinson drove a taxi. It is not clear just what the seaman in Loverich v. Warner did in his subsequent employment with the Reading Co., but it certainly was not maritime. This distinction between subsequent maritime





and non-maritime employment is impliedly recognized in the Loverich opinion:

"If he [the injured seaman] was already suffering from cancer in one of its developing stages he could hardly look to subsequent employers for the performance of this obligation." 118 F.2d 690 at 691 (3d Cir. 1941).

The subsequent employers referred to by the Court were obviously non-maritime employers who would have no obligation in any event for maintenance and cure.

Once a seaman voluntarily returns to full maritime employment, he is presumably no longer "incapacitated to do a seaman's work," and therefore, under the rule of the U. S. Supreme Court in the Vaughn v. Atkinson decision, itself, the shipowners' maintenance and cure obligation should terminate at that point. Furthermore, upon his return to full maritime employment, the seaman comes under the umbrella of the maintenance and cure of his new employer; he of course does not receive this broad protection where his new employer is non-maritime.

Strong policy considerations favor a rule which finally terminates a shipowner's obligation to provide maintenance and cure when the seaman voluntarily returns to full maritime employment.



First, such a rule clarifies and simplifies the relationship, rights and obligations between the seaman and his past and future employers - a sea of doubt under today's law. Labenz v. National Shipping & Trading Co., 153 F.Supp. 785 (D. Pa. 1957), perhaps exemplifies the present state of confusion. In that case the seaman's subsequent maritime employer, as a condition to the payment of maintenance and cure, required the seaman to assign his right to recovery of maintenance and cure from a prior maritime employer. In order to gain maintenance and cure from the prior employer, who took the position that the seaman was thereby attempting to recover double maintenance and cure, the seaman was forced to a lawsuit. The rule proposed would prevent the subsequent maritime employer, the one to whom the seaman may most conveniently look for maintenance and cure, from forcing the seaman to go against the prior employer for maintenance and cure, as the Plaintiff has done in this case, and from imposing conditions to payment as in Labenz.

Second, policies such as those embodied in statutes of limitations and rule of laches support the rule that voluntary resumption of full maritime employ-





ment terminates the seaman's right to maintenance and cure from a prior employer. As Justice Story himself noted, the merchant marine is "an arduous and perilous service." Its paths may lead to all the ports of the world. Once the injured seaman has returned to full maritime employment with a subsequent employer, as sometimes happens, he may experience a recurrence of his prior injury or disease as a result of incidents or conditions aboard the subsequent employer's ship. If under such circumstances the prior employer's obligation for maintenance and cure is not terminated by the seaman's resumption of full maritime employment, and the maintenance and cure is collected from him on the grounds that the recurrence was partially caused by the injury aboard the prior employer's ship, he is entitled to at least a partial indemnification from the subsequent employer for the contributing causation of the incidents and conditions aboard the latter's ship. See Jones v. Waterman S.S. Corp., 155 F.2d 992 (3d Cir. 1946); Gilmore and Black, Admiralty 273-77 (1957). And yet the prior employer may be faced with virtually impossible problems of proof in his attempt to show how the incidents and conditions of the subsequent employ-



ment caused the recurrence. Such difficulties of proof would relate to both the staleness of the evidence relating to the initial injury and the difficulty in locating the proof relating to the subsequent employment, perhaps in some remote area of the world.

An illustration of this problem is found in this case. Plaintiff in his action filed August 5, 1959, alleged that Permanente had "failed, neglected and refused to supply the Plaintiff with the expenses of his maintenance and cure, to his damage in the sum of \$10,000." (R.7). This claim was without foundation - Plaintiff was in maritime employment until January, 1961, and no right of maintenance and cure could have accrued until that time as was recognized by the Plaintiff's statement of his theory concerning maintenance and cure in the pre-trial order (Tr.142-143). If Plaintiff's attorneys had not included the erroneous maintenance and cure allegation in the action, Plaintiff would have been forced in January, 1961, to amend his action to add a cause of action for maintenance and cure. Such an amendment would have been made 3 1/2 years after the alleged accident upon which the maintenance and cure claim was based, and might well have been barred by laches.

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Even if not, Plaintiff had worked on nine ships since the accident, and the difficulty is apparent of attempting to prove the incidents and conditions of the Plaintiff's employments on those ships which might have contributed to the ultimate period of disability.

Permanente concedes that any realistic maintenance and cure must meet the primary objective of making whole the injured or diseased seaman; yet contends that the ship owner's obligation should be stretched no further than required to meet this objective. See the dissent in Vaughn v. Atkinson, 369 U.S. 527 at 536, 8 L.Ed.2d 88 at 95 (1962). A rule terminating the ship owner's maintenance and cure obligation upon the voluntary return of the seaman to another maritime employment meets that test.

The disability and the resultant need for maintenance and cure from a past employer probably no longer exists when a once injured seaman voluntarily returns to full maritime employment. This Court may judicially notice the increasing use by maritime employers of pre-employment physical exams. Permanente started using such exams in 1960 or so (Tr.350). Such exams tend to screen out the seaman who is not in fact fit for duty and thus to force the maintenance and cure obligation of the prior employer to continue as long as the





seaman really is unfit. Should the seaman's return to employment really be premature, however, and should he suffer a recurrence of the old injury or disease, he is within the maintenance and cure umbrella of the subsequent maritime employer. Neilson v. The Laura, supra.

Another consideration influencing the Supreme Court's decision in Vaughn v. Atkinson was avoidance of inducement to the employer to withhold maintenance and cure as a means of forcing sick seamen to go back to work when they should be resting. The rule suggested above would have no such effect, because the return to maritime employment would have to be voluntary. Furthermore, neither the seaman nor the prior shipowner can force the prospective subsequent maritime employer to employ the seaman, if his pre-employment physical exam shows him to be unfit. In this case there is no evidence that the Plaintiff ever requested maintenance and cure before he filed his action or that his continuation of maritime employment was not voluntary. And as mentioned above, the rule should have the effect of inducing prompt payment by clarifying and simplifying the obligation of maintenance and cure.



II. PERMANENTE'S OBLIGATION TO PAY MAINTENANCE AND CURE WAS TERMINATED BY PLAINTIFF'S REFUSAL, FAILURE, AND DELAY IN SEEKING AVAILABLE MEDICAL ATTENTION FOR THE CONDITIONS WHICH HE CLAIMS RESULTED FROM THE ACCIDENT.

At both his deposition and at trial, Plaintiff testified that his symptoms--headaches, dizzy spells, etc.--commenced approximately 15 days after the accident, while he was still a seaman aboard the Silverbow (Martinez' deposition 29, 53, Tr.209-210, 211, 265-266, 365). At the time that they occurred he certainly must have been well aware of those symptoms because otherwise he would not have been able to testify about them. In addition, he also testified that when he had episodes of dizziness and numbness in the arms and legs, etc. he would lie down for 30 to 45 minutes (Tr.209-210, 277). Furthermore, for relief of those symptoms he obtained aspirin and other pills from the purser aboard the Silverbow and aboard many other ships and from drug stores in his ports of call (Martinez' deposition 26, 29-30, Tr.213-215, 265-273). He was obviously also aware of the availability of treatment at U.S. Public Health Service Clinics because he had the laceration on his head treated at the U.S. Public Health Service Clinic in Honolulu initially (Martinez' deposition 22-23, Tr.206-209, 264, 361-362) and because





he went for treatment of his lacerated thumb to the U.S. Public Health Service Clinic in San Pedro, California, in March and April, 1958 (Exs.D-4b to D-4h). In this regard the following is stated in 1 Norris, Seaman § 594, 685 (2d.Ed. 1962):

"... The fact that United States Public Health Service Hospitals throughout the country are open to seamen for medical treatment is so well known among them that it should preclude the argument that seafarers may be ignorant of their right to free hospitalization and medical care."

In spite of the foregoing, after July 24, 1957, the Plaintiff did not see any doctor for the conditions that he now thinks resulted from the accident for three years until he went to Dr. Jordan at the U.S. Public Health Service Clinic in San Pedro in June, 1960, two weeks before his scheduled deposition (Martinez' deposition 29-30, Tr.369-370). Prior to this visit, the only "treatment" obtained by Plaintiff for these conditions was aspirin from pursers and drug stores. And even then, when he finally did see a doctor after three years, although he took the pills the doctor gave him, he apparently refused to follow the doctor's advice to go see a specialist for his condition (Martinez' deposition 27, 42, Tr.371-372, Ex.D-7). Instead he flew home.



Plaintiff finally did see a specialist in October, 1960, when he was examined by Dr. Lichter in Honolulu (Tr.142). This examination was apparently made to prepare Dr. Lichter to testify on Plaintiff's behalf at trial. There is no indication in the record, whatsoever, that Dr. Lichter ever treated the Plaintiff. Dr. Lichter admitted at trial that he was not then treating Plaintiff (Tr.174-175).

Even during 1961, following his visit to Dr. Lichter, when Plaintiff was not working, Plaintiff obtained no effective medical treatment. Although Plaintiff testified that his wife took him to a Dr. Rosenberg, to the neighbors and to some kind of temple, there is no indication of any treatment being rendered on these visits except for the Plaintiff's following testimony concerning the nature of his treatment at the temple:

"We used to go to--she used to take me to some kind of temple, and they used to put some kind of--let's see--invisible shot, they say, to--God was going to do a miracle, or something like that." (Tr.279).

Finally in 1962 Plaintiff obtained significant treatment for the conditions believed related to the accident when he was taken to San Diego County General Hospital and sent to Patton State Hospital. And yet even these



hospitalizations were not entirely voluntary (Tr.372-373).

Thus for 4 1/2 years or more after the accident that allegedly caused Plaintiff's disabling condition, Plaintiff did virtually nothing about his readily apparent symptoms that he testified were bothering him throughout the entire period. He did virtually nothing even though he well knew that free medical care was readily available to him.

Permanente contends that Plaintiff's refusal, failure and delay in seeking available medical care for symptoms thought to be a result of the accident extinguished as a matter of law its obligation to provide maintenance and cure. The Trial Court, therefore, erred in not granting its motion for summary judgment at the beginning of the trial, in not granting its motions for directed verdict during and at the end of the trial, in entering an erroneous conclusion of law that Plaintiff was entitled to maintenance and cure and in awarding supplementary judgment to the Plaintiff. The supplementary judgment should be reversed, and Permanente should be awarded judgment on appeal.

The law is clear with regard to the consequences of a seaman's refusal, failure, or delay to seek available





medical care for conditions upon which he is basing a claim for maintenance and cure. In Kossick v. United Fruit Co., 365 U.S. 731, 737, 6 L.Ed.2d 565 (1961), a recent case involving the seaman's right to insist on private medical care rather than care at a United States Public Health Service facility, the United States Supreme Court stated the rule as follows:

"Court of Appeals and respondent are certainly correct in considering that a shipowner's duty to provide maintenance and cure may ordinarily be discharged by the issuing of a master's certificate carrying admittance to a public hospital, and that a seaman who refuses such a certificate or the free treatment to which it entitles him without just cause, cannot further hold the shipowner to his duty to provide maintenance and cure. Williams v United States (DC Va) 133 F Supp 319; Luth v Palmer Shipping Co. (CA3 Pa) 210 F2d 224; The Bouker No.2 (CA2 NY) 241 F 831; see Calmar S.S. Corp. v Taylor, 303 US 525, 82 L ed 993, 58 S Ct 651." (Emphasis added.)

This honorable Court also stated the applicable rule in United States v. Johnson, 160 F.2d 789 (9th Cir. 1947), aff'd. in pertinent part 333 U.S. 46, 92 L.Ed. 468 (1948) as follows:

"It appears to be well settled that a seaman's right to maintenance and cure is forfeited by voluntary rejection of hospital



care.<sup>13</sup>

<sup>13</sup>Bailey v. City of New York, 2 Cir., 153 F.2d 427; Meyer v. United States 2 Cir., 112F.2d 482; See, Calmar SS Corporation v. Taylor, 303 U.S. 525, 531, 58 S.Ct. 651, 82 L.Ed.993; and Van Camp Sea Food Co. v. Nordyke, 9 Cir., 140 F.2d 902; certiorari denied 322 U.S. 760, 64 S.Ct. 1278, 88 L.Ed. 1587."

The seaman's explanation of his refusal of hospitalization in the Johnson case was that he had already been seen by half a dozen or more doctors who had given their opinions, and he saw no use in going back to another hospital which would simply provide one more doctor's opinions against those already given. If the refusal to obtain a specialist's opinion under those circumstances terminates the shipowner's obligation for maintenance and cure, a fortiori that obligation is terminated by the seaman's refusal to see a specialist at all.

The rule of United States v. Johnson has been recognized in several other circuits. The Court of Appeals for the Second Circuit summarily disposed of a libellant's maintenance and cure claim in Marshall v. Interational Merchantile Marine Co., 39 F.2d 551, 553 (2d Cir. 1930), with the following brief comment:

"We do not, however, find it necessary to consider this count from the standpoint





of laches, for the appellant's affidavit contains an admission fatal to her success in a suit for maintenance and cure. It asserts that she was offered hospital treatment and declined it. See The Bouker No. 2 (C.C.A.) 241 F. 831, 835; The Santa Barbara (C.C.A.) 263 F. 369, 371; Stewart v. United States (D.C.) 25 F.2d 869, 870."

See also Zackey v. American Export Lines, 152 F.Supp. 772 (S.D. N.Y. 1957), which cites United States v. Johnson.

The Courts of Appeal's decisions upholding the rule of United States v. Johnson are not restricted to cases involving an express rejection of proper medical care or an express refusal to seek out that care. In the recent case Wiseman v. Sinclair Refining Co., 290 F.2d 818, 820 (2d. Cir. 1961) the Court of Appeals for the Second Circuit noted as one of several grounds for reversing the trial court's award of maintenance and cure:

"Plaintiff's own testimony demonstrates his failure on several occasions in the course of his cure to seek medical attention and thus to keep the cost of his maintenance and cure to a minimum. Wilson v. United States, 2 Cir., 229 F.2d 277, 281; Repsholdt v. United States, 7 Cir., 205 F.2d 852, 856-857, certiorari denied 346 U.S. 928, 74 S.Ct. 308, 98 L.Ed.420; Bowers v. Seas Shipping Co., 4 Cir., 185 F.2d 352-354; The Saguache, 2 Cir., 112 F.2d 482."

In Repsholdt v. United States, 205 F.2d 852 (7th Cir.), cert. den. 346 U.S. 901, 78 L.Ed. 401 (1953),



an experienced seaman who, although marine hospitals were available, treated his own minor injury for 44 days, except for one trip to the United States Health Service Clinic where he was given some pills to take, until he saw his own doctor for treatment. The Seventh Circuit held that it was an error to allow him maintenance and cure on the ground that he failed to act with reasonable diligence and failed to go to a hospital to find out what really was the matter with him and to secure proper treatment.

In the Repsholdt case, the Seventh Circuit relied on Bowers v. Seas Shipping Co., 185 F.2d 352 (4th Cir. 1950). In that case a seaman who injured his knee aboard ship failed to go to available marine hospitals, even though the knee subsequently gave way twice, when he left the ship until his ankle was broken in a fall 50 days or more after the original knee injury. The Fourth Circuit held that he was not entitled to maintenance and cure because of his failure to act with reasonable diligence and his failure to go to a hospital to find out what was really the matter with him. See also Stone v. Marine Transport Lines, Inc., 182 F.Supp. 200 (D. Md. 1960) in which a seaman allegedly suffering from eye



trouble, traumatic epilepsy, anxiety state and post concussion syndrome who intentionally failed to keep a doctor's appointment was disqualified for subsequent maintenance and cure.

The policy behind the rule that the seaman's refusal, failure or delay in obtaining medical care terminates the shipowner's obligation to provide maintenance and cure is clearly one of minimizing the cost of maintenance and cure. Wiseman v. Sinclair Refining Co., 290 F.2d 818, 820 (2d Cir. 1961); See also Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 539 (9th Cir. 1962). It is also fully consistent with the reasons for maintenance and cure as noted above, particularly in that it is in the seaman's own best interest and the best interest of the merchant marine for him to seek prompt and competent medical care. Certainly a contrary rule which would keep able or potentially able workers idle could not be deemed a desirable one. See Vaughn v. Atkinson, 369 U.S. 536-537, 8 L.Ed.2d 88, 92 (1962).

Plaintiff's refusal, failure and delay in seeking medical care in this case were clearly more aggravated than in the cases discussed and should be held to have terminated Permanente's obligation to provide maintenance and cure.



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III. THE TRIAL COURT'S FINDING OF FACT THAT THE ACCIDENT CAUSED PLAINTIFF'S ILLNESS WAS ERRONEOUS BECAUSE ALL MEDICAL TESTIMONY CONCERNING THE CAUSAL RELATION BETWEEN THE ACCIDENT AND THE ILLNESS WAS INCOMPETENT.

Plaintiff alleges that he is entitled to maintenance and cure due to a disability caused by injuries from an accident on July 24, 1957, while employed by Permanente as a seaman aboard the Silverbow (R.5-7). His employment by Permanente aboard the Silverbow continued until December 12, 1957 (Tr.212, 266-267, 362-363, 517, Ex.P-11). The claimed period of disability for which the Trial Court awarded maintenance and cure commenced four years later in January, 1961(Tr.142). Permanente has no obligation to the Plaintiff for any illness occurring after his departure from the Silverbow unless that illness was proximately caused by an injury or incident which occurred while the Plaintiff was employed aboard the Silverbow. Bowers v. Seas Shipping Co., 185 F.2d 352 (4th Cir. 1950); The W. H. Hoodless, 38 F.Supp. 432 (E.D. Penn. 1941); Langeland v. United States, 93 F.Supp. 645 (S.D. N.Y. 1950); Luzuriaga v. Moore-McCormack Lines, 1955 A.M.C. 334 (Md., City Ct. 1955); see also 1 Norris, Seaman §§ 557, 566 (2d Ed. 1962).

With regard to the nature of the illness from



which the Plaintiff's claimed period of disability resulted, the Trial Court's findings were stated in its decision as follows:

"[H]e [Plaintiff] is in fact suffering from a form, at lease, of mental illness, whatever it may be called. . . ." (R.208).

In order for such an illness to be found to have been proximately caused by an accident which occurred while the Plaintiff was still employed by Permanente aboard the Silverbow, that illness must be shown to be directly related to the accident by expert medical testimony. The requirement that the causal relation between the accident and the alleged mental illness be direct rather than remote is stated in Thompson v. Railway Express Agency, 236 S.W.2d 36, 39 (Mo.App. 1961), which arose in the analogous area of workmen's compensation, as follows:

"A psychoneurosis under some circumstances does present compensable injury but this should not open the way for indiscriminate compensation on that score simply because it follows an accident. The causal connection with the accident must be proven by clear evidence, for such a neurosis may arise from any number of causes. Dr. Moore testified that Thompson's condition might have been aggravated by the discouraging and rather frightening statement made to him by the first physician he called upon. It might have been aggravated by his hospital treatment. That such conditions can and do at times arise from such things as unhappy domestic





situations, social relations, or financial worry, leaves their cause for the most part in the realm of nebulous speculation. The causal connection with an accident must not be remote."

The necessity for sufficient medical testimony to relate the disabling neurosis to the accident in order to justify a disability award based on that neurosis is set forth in International Paper Co. v. Wilson, 139 S.2d 644 (Miss. 1962) and Mississippi Products, Inc. v. Skipworth, 118 S.2d 345 (Miss. 1960). A similar case involving a recurrence of hip pain rather than mental illness was Anthony v. Lee Coal Co., 77 Atl.2d 657 (Penn. Supr. 1951). The reasons for requiring expert medical testimony in such cases are clearly stated by a leading authority in the field of workmen's compensation as follows:

"The increasing tendency to accept awards unsupported by medical testimony should not be allowed to obscure the basic necessity of establishing medical causation by expert testimony in all but the simple and routine cases and even in these cases such evidence is highly desirable and is part of any well-prepared presentation." (2 Larson, Workmen's Compensation § 79.54 at 304 (1961)).

The foregoing rulings are, of course, simply a special application of the general rule excluding opinion testimony of lay witnesses with regard to subjects



requiring special study and skill. This rule is stated in Jones On Evidence as follows:

" . . . Although some of the cases approach the border line, it is not to be inferred that the opinions of ordinary witnesses are competent as to subjects which require special study and skill and which are proper for the testimony of the expert as distinguished from the ordinary witness--for example, diagnosis of and distinction between forms of disease, or the cause and consequences of disease, especially such forms of disease as do not disclose themselves to the untrained eye in the general physical appearance of the sufferer." (2 Jones, Evidence § 405 at 759 (5th Ed. 1958)).

The medical evidence supporting Plaintiff's claim that his disabling illness was caused by the accident was given by three doctors--Dr. Low, Dr. Lichter and Dr. Hunter--who stated their opinions concerning causation in response to hypothetical questions (Tr.76-79, 167-170, 235). Dr. Low also gave such an opinion in direct testimony not in response to a hypothetical (Tr.47). All of this testimony was admitted over Permanente's objections (Tr.35-36, 74-75, 169-170, 219). Permanente moved to strike the doctor's testimony at the end of Plaintiff's case and again at the end of all the evidence, but the motions were denied (Tr.524-525, 748-751). Permanente contends that all of the testimony by Dr. Low, Dr. Lichter and Dr. Hunter concerning causation was incompetent in the following particulars.



- (1) The hypothetical questions to all three doctors improperly requested that they assume the very conclusions for which they were being asked.

The hypothetical questions to Dr. Low concerning causal relation between the accident and Plaintiff's mental illness and to Dr. Lichter concerning causal relation between the accident and Plaintiff's physical injuries were substantially identical. Both included in the requested assumptions the following language:

"I want you to further assume, Doctor, . . . that his injuries from the fall re-sulted in cerebral concussion, head and brain injuries, lacerations of scalp, back injury, nerve root involvement and probably compression fracture of C-6 and -7, cervical region; nervousness, psychiatric disability and mental disorder." (Tr.76-77, 167).

The hypothetical question to Dr. Hunter contained the following language:

"Doctor, do you have an opinion . . . as to whether or not there is a causal relationship between the episode which you have described on July 23, 1957 and the resulting conditions today? Is there a causal connection?" (Tr.235).

Whether these hypotheticals be characterized as truisms or as assuming their own conclusion, or as hoisting themselves by their own boot straps, or as begging the question or conclusion, or as avoiding the issue, or as leading, or as assuming facts not in evidence, their fallacy





is obvious. Having been told to assume that the conditions in question resulted from the fall, the doctors could have no meaningful opinion to offer the trier of fact concerning the existence of a causal relationship between those conditions and the fall. Treating the matter strictly as one of facts never introduced into evidence, the assumption that the Plaintiff's injuries from the fall resulted in the series of complications listed was nowhere supported by evidence in the case except the very opinion testimony given in reliance on the assumption. The hypothetical questions were all objected to generally on the grounds that the assumptions included facts not in evidence and particularly on the grounds that they assumed their own conclusions. Their incompetence in these regards is clear from this one aspect alone.

- (2) The three doctors' opinions, given both in response to hypotheticals and directly, were based on assumed material facts not then or thereafter proved and upon other opinions.

Dr. Hunter testified that he had received and read all of the medical reports written in the case and the records of San Diego County General Hospital and Patton State Hospital (Tr.231). The hypothetical question concerning the causal relation between the accident and the Plaintiff's conditions at the time of trial, which Plaintiff's attorney



put to Dr. Hunter, requested Dr. Hunter to assume the truth of the substance of all of those documents. The wording of the question was as follows:

"Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, taking into consideration your findings in your examination and the medicals that you read, the reports, hospital records, as to whether or not there is a casual relationship between the episode which you have described on July 23, 1957 and the resulting conditions today? Is there a causal connection?" (Tr.235).

Dr. Low and Dr. Lichter were likewise requested to assume the truth of the contents of the doctors' records as follows:

"I'm going to ask you, Doctor, to also assume the following facts: That he had been examined by doctors whose reports, findings, and opinions you have read, to wit: Dr. Rowlin Lichter, Dr. Maurice Silver, Dr. William L. Rhorer, Dr. Ralph B. Cloward, the U.S. Public Health Service Out-patient record, x-ray by Dr. George W. Henry, San Diego County General Hospital records, and Patton State Hospital records . . . ." (Tr.77-78, 168).

After Dr. Low was asked the hypothetical question, he expressly raised the issue as to whether or not he was to assume the substance of the medical records, and the Court instructed him that he was to do that (Tr.78). Dr. Low had previously testified that he had taken the Plaintiff's history partially from the records of Patton State Mental Hospital (Tr. 41), even though admitting that these records indicated that





Plaintiff's wife gave the information to the hospital historian (Tr.113). On cross-examination Dr. Low also testified that in the course of his examination of Plaintiff he has perused all the medical reports made available to him, which he listed, and that all of his opinion testimony was based on the substance of those reports, to a degree (Tr.97-98). He testified that he gave particular weight to the Patton State Hospital records (Tr.118-119). Dr. Hunter testified that his opinions, although previously formed, had been strengthened by many of the doctors' reports that he had read and that the opinion to which he testified in Court was based on all of the things that he had observed, including the doctor's reports and medical records (Tr.239-240).

The doctors' reports which Dr. Low, Dr. Lichter and Dr. Hunter were asked to assume the truth of the substance of in giving their opinion concerning the causal relationship between the accident and the Plaintiff's allegedly disabling condition were never admitted in evidence for the purpose of proving the truth thereof. Dr. Lichter, Dr. Hunter and Dr. Cloward testified in the case; so to the extent that their testimony was consistent with their reports, it might be considered that the substance of those reports was supported by evidence. Dr. Rhorer and Dr. Silver, authors of two of the



reports assumed valid in the hypothetical question, however, did not testify in the case. Their reports were admitted into evidence expressly for the limited purpose of showing the documents upon which the other doctors had relied in giving their opinion testimony, but not to prove the truth thereof (Tr.103-107, Exs.D-12 and D-13).

Although the hospital records were admitted in evidence as business records, they contain hearsay, particularly the history given by Plaintiff's wife, that was admissible only for the limited purpose of showing the information upon which the doctors at the hospitals based their diagnosis and treatment. 6 Wigmore, Evidence §§ 1718, 1719 (3d Ed. 1940). Several of the events included in the history given by the wife were not supported by the testimony of Plaintiff or any other witness at the trial. Indeed Plaintiff himself clearly contradicted the history of blackouts (Tr.368), a symptom which Dr. Low found to be significant (Tr.114-119). Dr. Low even went so far as to say that Plaintiff's statement, which was recorded in the hospital records, that the history of blackouts was a falsification was itself a falsification prompted by Plaintiff's desire to be released from Patton State Hospital (Tr.122-125).

All of the medical reports and hospital records of course included statements of the opinions of the doctors preparing them (E.g. Ex.D-12, D-13, P-5 and P-6).



Dr. Low, in giving his opinion, also took into consideration a letter in Spanish to Plaintiff from his social worker at Patton State Hospital (Tr.102-103) and an apparently verbal report from a psychologist of the results of certain tests he had made on Plaintiff (Tr.110-112). The letter was neither offered nor admitted in evidence, and the psychologist did not testify in the case.

It is clear a doctor's opinion testimony, particularly that given in response to a hypothetical, must be based upon facts which the interrogating party claims have been proved and for which there is supporting evidence. 2 Jones, Evidence §416 at 782 (5th Ed. 1958).

There is ample legal authority to the effect that a hypothetical question to a medical expert is improper if it is based upon a hospital record or some other doctor's medical report, first because it involves the assumption of facts not otherwise supported in the evidence in violation of the rule just stated, and second because it requests the witness to give an opinion which is based upon the opinion of another. With regard to the first of these two defects, the late Professor McCormick stated the following in his text:

"The prevailing view, however, is that a question calling for the witness' opinion on the basis of such reports [doctor's report or hospital records] (without reciting their contents as hypotheses, to be supported by other





evidence as their truth) is improper. The essential objection seems to be that since the question is not hypothetical in form, the jury is asked to accept as evidence the witness' inference, based upon someone else's hearsay assertion of a fact which is, presumably, not supported by any evidence at the trial and which therefore the jury has no basis for finding to be true." McCormick, Evidence 32 (1954). (Emphasis added.)

In the very recent case Wild v. Bass, 173 S.2d 647 (Miss. 1965), a doctor gave an opinion based on what the Plaintiff's mother had told him about the circumstances of the accident and also in reliance on x-rays not in evidence and on reports from other doctors who did not testify in the case. The Court held that it was error for him to give an opinion based on the statements of the Plaintiff's mother and went on to say:

"As an expert he could consider testimony of other doctors properly in evidence and also the result of any x-rays properly in evidence, but he should not have been allowed to base his testimony on reports of other doctors and x-rays not in evidence. . . . A medical expert should not be allowed to base his opinion on matters not within his own knowledge and not in evidence in the case." (At 651-652).

The reason for these rules are obviously that the trier of fact has no basis upon which to judge the truth of facts not admitted in evidence and, therefore, no basis for judging the reliability of a medical opinion based upon them.



With regard to the second defect that such a hypothetical question seeks an opinion based upon another opinion, the following is stated in Corpus Juris Secundum:

"Usually a hypothetical question to a medical expert is improper if it includes an opinion expressed by another expert; and his rule applies where an expert medical witness is called on to answer a hypothetical question which requires him to accept as true a hospital record which has been introduced into evidence and which contains notations in the form of opinions expressed by other physicians relating to the physical condition of the employee while a patient in the hospital." 100 C.J.S., Workmen's Compensation § 537, at 553-54.

This honorable Court established the same rule for the Ninth Circuit in Corrigan v. United States, 82 F.2d 106 (9th Cir. 1936) in which it held to have been properly sustained objections to questions requesting a doctor's opinion based on the diagnoses and other opinions of other doctors. The Court expressed its opinion as follows:

"We believe the question was objectionable because it would permit the expert to base his opinion on the opinions of other experts. In Laughlin v. Christensen (C.C.A. 8) 1 F. (2d) 215, 219, it is said: 'It is the rule that it is not allowable in asking a hypothetical question to incorporate into it the opinion of another expert. . . .' (At 107).

And see Zelenka v. Industrial Commission, 138 N.E.2d 667, 671-72 (Ohio 1956). In explaining this rule the late





Professor McCormick states:

"And it might be arguable, that since the expert in giving a private opinion would certainly take into account previously expressed opinions of other experts on the same question, he should be allowed to do so on the stand. But on the stand he is not asked merely to take them into account, but to assume them to be true, and if he does this his own opinion may then be but an academic echo. It is held that such a question, which asks the witness to assume the truth of testimony which itself includes expert opinions is improper." McCormick, Evidence § 14 at 31 (1954).

These two defects pervaded all of the opinion testimony given by Plaintiff's doctors and should be adequate grounds for complete rejection thereof.

- (3) Dr. Low's direct opinion testimony, which was not given in response to a hypothetical, was based on history, including past subjective symptoms, given by Plaintiff in order to prepare Dr. Low, a non-treating physician, for testifying at trial.

Dr. Low testified that his examination of Plaintiff had been for the purpose of preparing for trial and that he did not expect to treat Plaintiff (Tr.32-33). He stated that he had taken Plaintiff's history from Plaintiff himself and from the Patton State Hospital records, as discussed above (Tr.41). That history included recitals of Plaintiff's subjective symptoms (Tr.42-43, 47), and some obviously self-serving assertions by Plaintiff concerning his character and



personality prior to the accident (Tr.44). Thereafter Dr. Low gave his opinion concerning Plaintiff's diagnosis (Tr.44), prognosis (Tr.44) and his evaluation of the overall picture (Tr.44-45, 47), including an explanation of the effect that the blow Plaintiff received in this accident had upon him (Tr.47). These all refer exclusively to Plaintiff's subjective symptoms and, therefore, are obviously based on the history Dr. Low received from Plaintiff, since no hypothetical question had been put to the doctor up to that time.

Prior to the commencement by the doctor of his relation the history he had received and his opinions, Permanente objected to his giving opinion testimony other than in response to hypothetical questions, since he was not a treating physician (Tr.35). The Trial Court overruled the objection (Tr.35) and clearly erred in so doing.

The federal evidence rule is clear in such circumstances that the opinion of a doctor based on statements, including a recount of subjective symptoms, related to the doctor by the patient on an examination is inadmissible where the examination was made for the purpose of qualifying the doctor to testify as a medical expert.

Atlantic Coast Line R. Co. v. Dixon, 207 F.2d 899, 903



(5th Cir. 1953); Nashville, C. & St.L. Ry. Co. v. York, 127 F.2d 606 (6th Cir. 1942); Grand Trunk Pac. Ry. Co. v. Tollard, 286 F.676 (8th Cir. 1923); and see Cummings v. Boston & M.R.R., 212 F.2d 133, 135 (1st Cir. 1954) and Cf. Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940).

On the several foregoing grounds Permanente contends that the Trial Court erred in denying Permanente's motions to strike the testimony by Dr. Low, Dr. Lichter and Dr. Hunter, particularly insofar as that testimony related to any causal relationship between the accident and Plaintiff's allegedly disabling illness. This error was prejudicial because it related to all of the expert medical testimony tending to show that such a causal relationship existed, and the establishment of the causal relationship by expert medical testimony is a prerequisite to Plaintiff's recovery of maintenance and cure herein. Permanente contends, therefore, that on these grounds the supplemental judgment should be reversed and a new trial granted.



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IV. THE TRIAL COURT'S FINDING OF FACT THAT THE ACCIDENT CAUSED PLAINTIFF TO SUFFER A MENTAL ILLNESS WAS CLEARLY ERRONEOUS BECAUSE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

As previously indicated, the Court's finding that the accident caused Plaintiff to suffer "a form, at least, of illness" is regarded to be based on expert medical opinion testimony that the illness in fact existed and was directly related to the accident (pp.55 -57 supra). Permanente has heretofore contended that the medical opinion testimony relied on by the Trial Court was incompetent. Permanente further contends that that medical opinion testimony was manifestly outweighed by other evidence, medical and non-medical, which indicated that the accident was not the proximate cause of any mental illness in Plaintiff.

Nonetheless, analyzing the testimony of Dr. Low, we find that his diagnosis was post-traumatic mental disorder (Tr.44), almost as vague a diagnosis as the Trial Court's finding. The real basis of Dr. Low's opinion is Plaintiff's assertion that prior to the accident he was a hard worker, outgoing, and could support his family adequately (Tr.44) and the assumption that prior to the accident Plaintiff had none of the symptoms claimed to any incapacitating degree (Tr.78-79), whereas after the accident he did have such symptoms. Dr. Lichter testified, however, that when Plaintiff visited



him in October, 1960, he was "jovial, outgoing more or less" (Tr.145). And there is no evidence in the record that Plaintiff even had a family to support prior to the accident. He was married in December, 1958, one-and-a-half years afterwards (Tr.379, 384-385). Most significant of all, however, is that neither the hypothetical question put to Dr. Low concerning the causal relation between the accident and Plaintiff's post-traumatic personality disorder (Tr.76-77) nor the Plaintiff's history, when given to Dr. Low, included any chronology of the symptoms Plaintiff claimed to have experienced (Tr.113). In other words, Dr. Low reasoned that before the accident Plaintiff was a model of adjustment without any symptoms, and at some unknown times during the six-and-a-half years between the accident and the trial he had symptoms, and therefore, the symptoms were the result of the accident, q. e. d.

The fallaciousness of such post hoc, propter hoc reasoning is too obvious to belabor. Suffice it to recall that there are listed in the opinion in Thompson v. Railway Express Agency, 236 S.W.2d 36, 39 (Mo.App.1961) some of the various possible causes of psychoneurosis, which is one type of possible post-traumatic personality disorder.

Dr. Low's evaluation of the overall case is no more logical. He emphasized that prior to the accident Plaintiff was in the protected environment of the merchant marine where he knew





just what to do (Tr.45) and that supposedly the accident suddenly made him less able "to cope with the stresses that are present in today's world" and thus raised fear within him (Tr.45, 47). But Plaintiff remained within his "protected environment". He stayed in the merchant marine and did his usual work for three-and-a-half years after the accident (Tr.267-277, 362, R. 122-124), and there is no testimony whatsoever that any sequelae of the accident in any way interfered with Plaintiff's ability to do his job during that time. There is no evidence that Plaintiff had "to cope with all the stresses that are present in today's world", at least until he was married in December, 1958.

Reviewing Dr. Hunter's testimony in order to determine the weight to be given it, we note that his diagnosis of Plaintiff's problem was that Plaintiff showed the classic symptoms of post-concussion syndrome. It appears that he, too, was given merely a list of symptoms (Tr.226-227), not a chronology of when they occurred. He compared that list with the appropriate list for post concussion syndrome, (a syndrome being merely a "symptom complex") (Tr.231). The evidence showed, however, that Plaintiff did not begin to have headaches, dizzy spells and blurring of vision for 12 to 15 days after the accident (Tr.209-210, 211, 265-266). The numb feeling in his legs and arms started one



or two months after the accident (Tr.365-366). And the ringing in his ears did not start until three-and-a-half years later when he was aboard the Monterey in December, 1960 and January, 1961 (Tr.278). Dr. Cloward's testimony, which was unrebutted in this regard, was that if Plaintiff had suffered a post-concussion syndrome his headaches and dizzy spells would have come on immediately thereafter. He testified that since Plaintiff did not have these symptoms immediately after the accident, he had not had a concussion in the accident (Tr.545-546). He also testified that he doubted very much if the accident could have caused Plaintiff to suffer any organic psychosis (Tr.547). This testimony, too, was unrebutted.

Another most significant aspect that must be noted with regard to the weight to be given to the opinion testimony of both Dr. Low and Dr. Hunter is that the mental illness that they believed that Plaintiff had suffered as a result of the accident were both characterized solely by subjective symptoms (Tr.41-47, 116-117, 230-231, 243-244)--not observed by the doctor but merely communicated by the patient (Tr.116-117). In giving medical opinions based on such testimony a doctor necessarily relies on the veracity of the patient or person relating them to him (Tr.244). In this case very substantial doubt was cast upon Plaintiff's veracity at nearly every step. He told





four different stories concerning the way in which the accident happened and his testimony conflicted with that of both Captain O'Brien and the union delegate Awakuni, a disinterested witness, in several material particulars (see pp.6-10, 13-14 supra). It was apparent that the Court did not rely on Plaintiff's testimony at least concerning where the accident occurred, preferring to look to Permanente's admission in an answer to interrogatory (No.8, R.30) which was not even offered or admitted in evidence in the case (Tr.H-19, R.206-208). And the psychiatrist Dr. Low, Plaintiff's own witness, testified that it was his opinion that Plaintiff lied at the Patton State Hospital when prompted by his desire to leave that institution (Tr.122-125).

Even more significant, both with regard to the doubt case upon Plaintiff's veracity and with regard to direct factual rebuttal of the Trial Court's finding that the accident proximately caused Plaintiff to suffer a mental illness, are Plaintiff's work history and his medical history, or lack thereof, during the three-and-a-half years from the date of the accident until January, 1961. Plaintiff worked full voyages of approximately three months duration each on eight or nine ships during that time (see pp.14-15 supra). It is not reasonable to expect he would have been able to do that if he had been suffering the symptoms he claims in sufficient intensity to result





in mental illness. Whether or not he could have worked, furthermore we do not believe that he would have, if he had been suffering the symptoms he claims. As an experienced seaman, he was well aware of his right to take time off to recuperate and to draw maintenance and cure while doing so. He did that during March and April, 1958, after he had cut his thumb (Ex.D-4b - D-4h, Martinez' deposition 39, 41). In spite of this there is no evidence whatsoever that Plaintiff, himself, requested either time off or maintenance and cure for the symptoms claimed from any employer at all during the entire time.

As indicated above, Plaintiff was well aware of the availability of free medical treatment at United States Public Health Service facilities for any symptoms he might have had (pp.46-47, supra). Nonetheless he saw no doctor for his symptoms until three years after the accident when he saw Dr. Jordan at the United States Public Health Service Clinic in San Pedro, in June, 1960. And even then he did not follow Dr. Jordan's instruction to go see a specialist. Plaintiff's egregious refusal, failure and delay in seeking medical treatment for his symptoms, (pp.46-49, supra) belies the very existence of those symptoms. What is more, when Plaintiff did go to the United States Public Health Service Clinic in San Pedro after he had cut his thumb and to Dr. Jordan and Dr. Lichter with regard to



his symptoms, he did not even mention several of the supposedly continuous symptoms which were related by Dr. Low and Dr. Hunter to his mental illness--blurring of vision, dizziness, mental sensations and confusion of mind (Ex.D-4b - D-4h, Tr.142-145). The best explanation for Plaintiff's failure to even mention his claimed symptoms to the doctors was that he simply did not have them.

Another aspect of Plaintiff's medical history that significantly rebuts the Trial Court's finding of causation is that Plaintiff was declared fit for duty by United States Public Health Service Clinics no less than three times between the date of the accident and January, 1961, on July 24, 1957 in Honolulu (Ex.D-4a), on April 11, 1958 in San Pedro and again on June 27, 1960 in San Pedro (Ex.D-4b - D-4h). The first and the last of these visits on which Plaintiff was found fit for duty were directly related to the symptoms Plaintiff was supposedly suffering as a result of the accident. The significance of such clinical findings that a seaman is fit for duty has been discussed at length in decisions relating to maintenance and cure. Norris states:

"Where a seaman has been discharged from a Marine Hospital as 'fit for duty,' the courts may, and generally do, use the date of such discharge when determining the end of the period for which the seaman is entitled to maintenance and cure." 1 Norris, Seamen § 561, at 634 (2d Ed. 1962).





It is conceded that the issuance of a fit-for-duty slip is not conclusive. The appropriate weight to be given to the fact, however, is well described in Carleno v. Marine Transport Lines, Inc., 317 F.2d 662, 665 (4th Cir. 1963) as follows:

"Of course, the certification of his capability as of that date is not conclusive. But it is a consideration of quite some import. Especially when within a few months and for the next two years he ships in the rugged service of an ordinary sailor as well as in the less rigorous life of a bo'sun." (Emphasis added.)

See also Dobbs v. Lykes Bros. Steamship Co., 243 F.2d 55 (5th Cir. 1957).

It must be noted that the Trial Court's decision fails even to mention the United States Public Health Service Clinics' findings that Plaintiff was fit for duty.

Permanente contends that in view of all of the foregoing factors, the manifest weight of the evidence shows that Plaintiff did not suffer mental illness as a proximate result of the accident involved in this case. To be compared with the Trial Court's decision in this case are W. H. Hoodless, 38 F.S. 432 (E.D. Pa. 1941); Langeland v. United States 93 F.Supp. 645 (S.D. N.Y. 1950) and Luzuriaga v. Moore-McCormack Lines, 1955 A.M.C. 334 (Md. City Ct. 1955). In those three cases the



evidence was less extreme and weighed less heavily against the Plaintiff than it does in this case, and yet in each the Trial Court ruled that it had not been shown that the disability involved was caused by the accident aboard the Defendant's ship.

On this ground, Permanente contends that it is entitled to reversal of the supplemental judgment and to judgment on appeal.

DATED: Honolulu, Hawaii, January 31, 1966.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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No. 20241

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL  
OPERATING CO., a Nevada corporation, BELDON R.  
KATLEMAN, MCA ARTISTS, LTD., a Delaware corpo-  
ration, ROY GERBER, and MATT GREGORY,

*Appellants,*

*vs.*

RENE BARDY,

*Appellee.*

---

Opening Brief of Appellants MCA Artists, Ltd.  
and Roy Gerber.

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No. 20241

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL  
OPERATING Co., a Nevada corporation, BELDON R.  
KATLEMAN, MCA ARTISTS, LTD., a Delaware corpo-  
ration, ROY GERBER, and MATT GREGORY,

*Appellants,*

*vs.*

RENE BARDY,

*Appellee.*

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Opening Brief of Appellants MCA Artists, Ltd.  
and Roy Gerber.

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## I.

### INTRODUCTORY STATEMENT.

This brief is presented on behalf of Appellants MCA Artists, Ltd., (hereinafter referred to as "MCA") and its employee (at the time of the events with which the Court is concerned), Roy Gerber (hereinafter referred to as "Gerber").

In the interests of convenience, a Joint Statement of Points to Be Relied Upon was filed by all of the Appellants. However, because this is an appeal in an action for conspiracy against multiple alleged co-conspirators who are now appellants, separate briefs, relating the respective and sometimes differing positions of the alleged co-conspirators, are being filed. Every effort has been made by Appellants to minimize the length of the briefs and, to that end, where there is no difference in position between the various alleged co-conspir-

ators, Appellants have, at the suggestion of the Clerk of this Court and by stipulation, adopted and incorporated by reference various portions of the brief of the other Appellants. In this manner each of the Points To Be Relied Upon filed by Appellants jointly will be covered only once. Appellants MCA and Gerber disavow any intention to abandon or waive any points and arguments so incorporated by reference from the Briefs of the other Appellants.

## II.

### JURISDICTIONAL STATEMENT.

This case arose in the United States District Court for the District of Nevada in Las Vegas upon Appellee Bardy's Complaint and Amended Complaint [Clk. Tr. 1, 140] alleging Bardy to be a citizen of the French Republic, the Appellants "of a citizenship diverse" from that of Bardy, and that the amount in controversy exceeded ten thousand dollars (\$10,000) exclusive of interest and costs [Clk. Tr. 1824; 28 U.S.C. §1332]. In addition, the Amended Complaint asserted a claim "for infringement of the trade name 'La Nouvelle Eve'" having an "adverse effect" on Bardy's interstate business [15 U.S.C. §1121; 28 U.S.C. §1338(a); 15 U.S.C. §1126 (b) (g) (h); Clk. Tr. 1824]. Appellants denied the District Court's jurisdiction under the so-called Lanham Act or under any theory of a federal law of unfair competition in the use of a title or trade name in their respective amended answers [Clk. Tr. 1836-1839; 217, 241, 301, 1125, 1142, 1201, 1210, 1223].

After a jury verdict in favor of Appellee [Clk. Tr. 1875-1876], the District Court entered a final judgment on the jury verdict [Clk. Tr. 1877-1879]. Alternative motions for Judgment Notwithstanding the Verdict or a new trial were duly made by Appellants [Clk. Tr. 2346, 2343, 2353, 2380] and denied without opinion [Clk. Tr. 2226]. Appellants filed a timely Notice of

Appeal [Clk. Tr. 2306, 2307, 2308], and a supersedeas bond [Clk. Tr. 2311-2313]. This Court's jurisdiction is invoked under 28 U.S.C. §1291.

### III.

#### STATEMENT OF FACTS.

This is an appeal from a jury verdict and judgment and from a denial of Appellants' Motion for Judgment Notwithstanding the Verdict and New Trial in the District Court of Nevada upon a Complaint charging Appellants with a conspiracy to cause injury to certain "property" and "contractual rights" claimed by Appellee, Rene Bardy, with resulting damage to those alleged rights. On the conspiracy count with which this Brief is concerned, the District Court jury in Carson City, Nevada, awarded Appellee \$251,200 compensatory damages and \$225,000 punitive damages after a lengthy trial with over 3,000 pages of transcript and several hundred exhibits.

Appellant MCA at the time of the events leading up to this litigation, was a major talent agency, representing all types of talent both in the United States and in other parts of the world, seeking to obtain employment for such talent with potential employers. For its services, MCA received the standard agent's fee of ten per cent commission on employment obtained by it for its clients. Appellant Roy Gerber, at the time of these events, was an employee of MCA, working as a talent agent in the Las Vegas office of MCA.

#### A. The Initial Relationship Between Bardy and MCA.

In July, 1958, David Baumgarten, an employee of MCA, saw a French Revue at a nightclub in Paris called "La Nouvelle Eve" ("The New Eve") [Pltf. Ex. 75]. He communicated what he had seen to other MCA agents, particularly to David Stein (hereinafter referred to as "Stein") of the MCA Paris office and

Gerber of the MCA Las Vegas office [Pltf. Ex. 83]. On or about August 1, 1958, MCA, through Stein, and Appellee (hereinafter referred to as "Bardy"), producer of "La Nouvelle Eve", entered into an artist's agency contract whereby MCA agreed to represent Bardy in his career as a producer of night club shows, "without, however, guaranteeing the success of its endeavors" [Pltf. Ex. 73]. Bardy reserved to himself under that contract the right to refuse to accept any "business proposals submitted to him by MCA" [Pltf. Ex. 73]. *It was stipulated by Bardy at the trial that both MCA and Gerber fully and faithfully performed all of their duties under that contract until on or about April 1, 1959* [Rep. Tr. 2354-2355].

**B. MCA's Representation of Bardy: The Original Contract Between La Nouvelle Corporation and Elranco Hotel Operating Co.**

In the normal course of seeking employment for MCA's talent clients, Gerber told Beldon Katleman (hereinafter referred to as "Katlman"), owner of the El Rancho Hotel Operating Co. which operated the El Rancho Vegas Hotel, and other Las Vegas hotel owners, about the show at "La Nouvelle Eve" in Paris [Pltf. Exs. 448, 449, 450, 451]. In October, 1958, Katleman went to Paris to see the Revue presented by Bardy [Pltf. Exs. 450, 451]. The show was small and intimate, consisting essentially of tableaux [Pltf. Ex. 452]. Negotiations were commenced between Katleman and Stein to bring the intimate Revue to Las Vegas for a limited engagement. Later that same month Bardy came to Las Vegas on behalf of his La Nouvelle Eve Corporation to negotiate further with Katleman [Pltf. Exs. 454, 455]. In the course of those negotiations, Bardy saw such Las Vegas spectacles as The Lido show then playing in Las Vegas. He expressed concern over his small, intimate show playing at the El Rancho Vegas in competition with such more



spectacular, expensive, and lavish shows as The Lido and The Folies Bergere [Rep. Tr. 2358, line 9, to 2360, line 4; Pltf. Ex. 456]. Gerber assured Bardy that Katleman neither wanted nor could afford a Lido type show and wanted a smaller, more intimate type of revue [Rep. Tr. 2359, line 22, to 2360, line 3]. Terms were finally agreed upon and in December, 1958 [Pltf. Ex. 465], an agreement was signed between El Rancho Hotel Operating Co., owner of the El Rancho Vegas Hotel, and La Nouvelle Eve Corporation [Pltf. Exs. 90, 90A]. It was agreed that in addition to the tableaux used in Paris, three specialty acts, hired domestically, would be included in the production. Further, because Katleman had objected to the looks of at least one of the girls he saw in Paris, Bardy agreed to replace her with a girl hired in the United States. [Rep. Tr. 2417-2421].

This turned out to be Miss Janine Caire, an attractive female French singer, hired by Bardy in New York [Pltf. Exs. 100, 101, 102] whose "contract" with Bardy became a matter of much dispute in the subsequent dealings between La Nouvelle Eve Corporation and Katleman. Bardy was never able to establish by documentary evidence the nature of his contract, if any, with Caire [Rep. Tr. 1279, 1284, 1943, lines 16-25], although he testified he had such an agreement for the original and extension term of his show's run at the El Rancho Vegas Hotel [Rep. Tr. 1278-1280].

The basic contract between La Nouvelle Eve Corporation and El Rancho Hotel Operating Co. provided for a ten weeks engagement beginning January 28, 1959 and the agreed upon price was a gross of \$15,000 per week to La Nouvelle Eve Corporation [Pltf. Exs. 90, 90A]. In his negotiations with The American Guild of Variety Artists (hereinafter referred to as AGVA) the Guild having jurisdiction over night club performers in the United States, Bardy was advised, in December, 1958 and January, 1959, that because of quota



restrictions imposed by the Guild on foreign acts, his show could not play anywhere but Las Vegas. Accepting the restriction, Bardy signed, on behalf of La Nouvelle Eve Corporation, the standard AGVA Minimum Basic Agreement [Pltf. Ex. 105]. The show opened as scheduled at the El Rancho Vegas Hotel on January 28, 1959.

### **C. Negotiations to Extend the Original Contract: Developing Problems.**

In February and March, 1959, negotiations were begun by Gerber, as Bardy's agent, Bardy and Katleman for an extension of the original ten week contract. Being in a poor bargaining position because of the AGVA restriction making it impossible to book the show elsewhere, MCA and Gerber vigorously exercised their efforts to prevail upon AGVA to lift the restriction [Pltf. Exs. 98, 215; MCA Ex. DR, EL, MP]. Such efforts on Bardy's behalf were continued by MCA and Gerber throughout the term of the contract [Rep. Tr. 2513, 2514]. During this same period, Janine Caire entered into a personal management contract with Matt Gregory (an independent personal manager in Las Vegas), and made demands for a higher salary and new gowns in any extension period [Rep. Tr. 2303, line 5, to 2304, line 23; 2306, lines 1-22; 2309, line 22, to 2310, line 19; 2312, lines 11-25; 2317, lines 1-7]. In the negotiations for the extension contract, Bardy gave to Gerber a letter dated March 5, 1959 [Pltf. Ex. 469] stating, for communication to Katleman, his agreement to Katleman's extension terms, particularly that Bardy could "guarantee" the extension of the contracts of the performers for the additional period and stating that if there was any need for replacements, he would take care of them from Paris [Pltf. Ex. 469; Rep. Tr. 2492-2496]. Only with respect to Charles Henchis, the choreographer, did Bardy request that Gerber attempt to assure himself of a

“signature” since “he has only signed for ten weeks in Las Vegas” [Pltf. Ex. 469; Rep. Tr. 2492]. Bardy later determined that he did not need a new agreement for Henchis because his original contract was for the run of the show and any extension [Pltf. Exs. 57, 473]; Gerber did, however, on March 6, 1959, obtain from Henchis a contract for this extension term as directed by Bardy [Pltf. Ex. 183]. This letter, along with a copy of the proposed extension agreement [Pltf. Ex. 492] were signed by Bardy on March 6, 1959, for delivery to Katleman. Katleman had insisted on Bardy’s assurances that there be no cast changes without proper and approved replacements because he had heard that certain members of the cast would not remain [Rep. Tr. 2656-2658]. In particular, Katleman had been told that Aleta Morrison, a solo dancer [Rep. Tr. 2657, lines 12-19] and Janine Caire, a featured “chanteuse”, would not remain in the show during the extension period [Rep. Tr. 2657, lines 24-25]. When the March 6, 1959 letter and proposed contract [Pltf. Exs. 469, 470, 472] were delivered to Katleman (stipulated to be a proper act on Gerber’s part [Rep. Tr. 2495, lines 17-19]), he held off signing the contract until March 13, 1959, because certain other replacements that were to be made by Bardy had not yet been made [Rep. Tr. 2657-2658]. Specifically these involved a replacement for a pregnant girl about whose performance on the stage a number of complaints had been received and a female mannequin whose appearance Katleman did not feel was in keeping with the rest of the show [Rep. Tr. 2658, lines 6-17]. With these reservations in mind, Katleman was reluctant to sign the extension agreement until conditions were fulfilled by Bardy [Rep. Tr. 2658, lines 23-25], conditions dating back to the period of the original contract and its negotiations [Rep. Tr. 2420, lines 7-19]. Further, there was a continuing dispute between Katleman and Bardy over who was to pay the transportation costs of bringing the troupe

from Paris and returning it at the end of the contract, along with other disputes involving among other things, finances, deductions, costs [Rep. Tr. 2421-2425].

**D. MCA and Gerber's Attempts to Resolve Disputes: The Extension Contract and Its Negotiations: The Bardy-Katleman Feud.**

Knowing of the differences between Bardy and Katleman on the above points, both as to the original and the proposed extension contract, Gerber, on or about March 6, 1959, telephoned Katleman, who was in New York, asking that he return to Las Vegas for a meeting with Bardy to clear up those matters and to get the contract signed. To this Katleman agreed. However, before Katleman could meet with Bardy in Las Vegas, Bardy departed mysteriously for Paris [Rep. Tr. 228, lines 17-19; 230, line 7, to 236, line 6], leaving word that he would give Katleman until March 16, 1959 to sign the extension agreement. Having flown over 2,000 miles to meet with Bardy at Gerber's request to work out the contract problems, Katleman was irate to find that Bardy had departed for Paris [Rep. Tr. 230-236; Pltf. Ex. 186]. However, after being placated by Gerber and being assured by Gerber of Bardy's good faith, and after being reassured by Bardy's promises in the March 6 letter given him along with the extension contract [Pltf. Ex. 469], Katleman signed the extension contract on March 13, 1959 [Pltf. Ex. 472]. Under the terms of the extension contract, Bardy was to receive \$5,000 per week with the Hotel paying the salaries of the troupe, Henchis wardrobe and seamstress employees, AGVA Welfare Fund payments and MCA's commission [Pltf. Ex. 472]. On the original contract MCA's commission was \$1500 per week. Under the agreed upon extension contract, MCA received commission only on the cost of the show, which to MCA was a reduction to \$657 per week [Pltf. Exs. 473, 179; Rep. Tr. 1859-61, 2555]. Peter Holmes (herein-



after referred to as "Holmes"), a member of the cast of the show and Bardy's interpreter while he was in Las Vegas [Pltf. Ex. 467; Rep. Tr. 216, lines 7-17], wrote Bardy on March 10, 1959, telling him that Katleman was furious over Bardy's unexplained departure and describing Gerber's good efforts on Bardy's behalf to explain away Bardy's behavior [Pltf. Ex. 186]. Holmes again told Bardy in that letter that Aleta Morrison would not continue with the show in the extension term and would have to be replaced.

On March 13, 1959, Bardy wrote two letters to Holmes [Pltf. Exs. 191, 193]. He blamed his troubles with Katleman on Charles Henchis, the choreographer of the show (hereinafter referred to as Henchis) who, Bardy suspected, was undermining him with Katleman; he recognized that Morrison would probably not continue with the show and told Holmes that he was sending Regis Durieux, his Paris director (hereinafter referred to as Durieux) to take over "management" of the show during his absence [Pltf. Ex. 193]. Again, on March 15, 1959, Holmes wrote Bardy advising him of problems with the cast, of the need for replacements and of some of the difficulties with Henchis [Pltf. Exs. 196, 197].

In the interim, between March 6, when Bardy abruptly left Las Vegas in the midst of the negotiations, and March 20, 1959, Gerber obtained, as instructed by Bardy, an agreement from Henchis to continue with the show during the extension contract [Pltf. Ex. 183], tried to persuade Caire and Morrison to stay on [Rep. Tr. 2510, lines 15-21] and continued to pressure AGVA to lift its restrictions on the show's playing outside Las Vegas [MCA Ex. EL]. Katleman, on the other hand, desired the AGVA restriction be maintained for his own exclusive hold on the show [Tr. 2203-2205].

On March 20, 1959, not having heard from Bardy since he departed from Las Vegas on March 6, Ger-

ber wrote to Stein in Paris requesting that he make arrangements with Bardy for sending over the replacements Bardy had promised [MCA Ex. MW; Rep. Tr. 2501-2502 to line 10]. On March 23, 1959, Holmes wrote Bardy that Katleman was demanding that the promised replacements be made and outlined again to Bardy the continuing dispute between Bardy and Katleman over costs and billing [Pltf. Ex. 205]. On March 24, 1959, Bardy wrote Holmes that Katleman was "annoying" him and that he would put another show in Las Vegas and see that Katleman was boycotted by all French shows in the future if Katleman did not stop annoying him [Pltf. Ex. 267]. Bardy told Holmes to obtain the name of a lawyer in Las Vegas and to tell Katleman that if he wanted any replacements, he, Katleman, would have to come to Paris for them. He told Holmes that Durieux, his director, would be available in Las Vegas and that Holmes should look to Durieux for advice [Pltf. Ex. 267].

On March 25, 1959, the AGVA Executive Committee voted unanimously not to permit "La Nouvelle Eve" to play outside of Las Vegas, despite all MCA's efforts [Pltf. Ex. 509]. However, word of this AGVA action did not reach Gerber until March 30, 1959 [Pltf. Ex. 215].

AGVA was not named in Bardy's Complaint as a conspirator although the Las Vegas local representative of AGVA, Fred Haettel, was [Clk. Tr. 1, 3, lines 18-23]. Haettel was acquitted of the conspiracy charge by the jury despite the fact that he was a participant in practically every act and decision charged by Bardy as being evidence of the alleged conspiracy by MCA and Gerber [Clk. Tr. 1875-1876].

On March 25, 1959, Bardy finally wrote to Gerber and to Katleman to explain his theretofore unexplained departure from Las Vegas on March 6. His only explanation was that "urgent business" had required his



return to Paris and he told Gerber and Katleman that he was sending Durieux as his "substitute" in Las Vegas [MCA Ex. EJ].

On March 26, 1959, Durieux arrived in Las Vegas but brought no replacements or explanations with him. The same day, Gerber wrote Bardy again advising him of the problems with the cast, AGVA and Katleman. He again asked Bardy to send the promised replacements [Pltf. Ex. 475]. On March 29, 1959, Durieux, Bardy's Las Vegas "substitute", cabled Bardy that unless Bardy sent the replacements as agreed, Katleman would terminate the show on April 8, 1959, the first day of the show's run under the extension contract [Pltf. Ex. 211]. On March 30, 1959, Bardy cabled Durieux in reply that he would not be "blackmailed" by Katleman and that instructions would follow in a letter [Pltf. Ex. 213]. On March 31, 1959, Durieux cabled Bardy that the situation with Katleman was "grave" and asked Bardy to telephone him (Durieux) [Pltf. Ex. 212]. The same day Bardy wrote Holmes telling him to obtain the name of the attorney in Las Vegas who had previously made trouble for Katleman and the El Rancho Vegas Hotel [Pltf. Ex. 217]. He instructed Holmes to have the show present and ready to go on stage on the evening of April 8 and to get in touch with the French consul [Pltf. Ex. 217]. The same day, Bardy cabled Durieux that there was "no use" telephoning [Pltf. Ex. 220] and cabled Katleman that he would hold Katleman to the extension contract [Pltf. Ex. 219]. Aside from Bardy's totally unconstructive March 25 letter to Gerber explaining his sudden departure from Las Vegas on March 6, Bardy did not communicate with Gerber or MCA at all between March 6 and March 31, 1959, despite all of the foregoing described events. All of Bardy's plans and instructions regarding the replacements, the extension contract, Katleman's demands and what to do in

the event of a cancellation, were communicated to Holmes and Durieux but not to Gerber or MCA. Bardy stipulated repeatedly during the trial that prior to April 1, 1959, MCA and Gerber faithfully performed their duties as Bardy's agents in Las Vegas and that at least as to them, the alleged conspiracy occurred on or after April 1, 1959 [Rep. Tr. 2354-2355].

**E. The Anticipatory Breach Dispute—  
April 1 to 8, 1959.**

On or about April 1, 1959, Katleman decided that there was an anticipatory breach of the extension contract by Bardy and determined to place the entire question of his contractual relationships with Bardy's La Nouvelle Eve Corporation before AGVA, the organization having jurisdiction over such disputes. Katleman then asked Gerber, as Bardy's agent, to give him in writing a statement as to whether Bardy had or had not made arrangements for the promised replacements [Rep. Tr. 2503-2509, line 23]. Gerber had just been told by Holmes of Bardy's provocative letter to him saying that he would not send the replacements and that if Katleman wanted them, he would have to come to Paris to get them [Pltf. Ex. 217, p. 3]. Gerber told Katleman that he could not unilaterally declare a breach of a contract that was to commence eight days later and Gerber believed that submission of the dispute to AGVA was the proper procedure [Rep. Tr. 2506-2514]. Gerber told Katleman on April 1, 1959 that to date he had not been able to get "anything definite" from Bardy about any of the replacements. [Pltf. Ex. 222, p. 3]. That same day Katleman obtained from Janine Caire and Aleta Morrison letters stating that neither had made any agreement to remain with the show after the expiration of the original ten weeks engagement [Pltf. Ex. 222, pp. 2, 5]. Katleman then wrote Mr. Jackie Bright of AGVA in New

York, sending him (1) a copy of the extension contract as signed by Katleman for El Rancho Hotel Operating Co. and Bardy for La Nouvelle Eve Corporation; (2) a copy of Bardy's March 6, 1959 letter to Gerber for transmittal to Katleman guaranteeing the contracts of the cast members for the extension contract period and agreeing to make any necessary replacements from Paris; (3) a copy of the Gerber, Caire and Morrison letters of April 1, 1959 above described and (4) a memorandum from Tom Douglas to Katleman saying that it had come to his attention that several members of the cast had no contracts beyond the April 7 date and did not wish to return for the extension contract period [Pltf. Ex. 222, p. 4]. Although Douglas, under cross-examination, testified he did not recall signing the memorandum [Rep. Tr. 469-470], he testified that he had knowledge of its contents, specifically that Aleta Morrison planned when she came to Las Vegas with the show to go to the Paladium in London when the original Las Vegas contract was finished [Rep. Tr. 471-472, to line 17].

Katleman's letter to Jackie Bright at AGVA forwarding the above, stated that because he anticipated a definite breach of contract he wanted AGVA to "justify our position" [Pltf. Ex. 222, p. 1].

Gerber demanded copies of the Katleman letter to Bright, along with its enclosures, and sent them to Paul Sherman, MCA's house counsel in New York [Pltf. Ex. 477; Rep. Tr. 2503-2505, line 10] saying that as things stood between Bardy and Katleman there was not much hope for the show being held beyond April 7; that if AGVA upheld Katleman's position, there would be no choice but to go along with Katleman and close the show out [Pltf. Ex. 477]. Gerber testified that he felt that if Sherman agreed, he could proceed to make arrangements for the return of the performers and the show intact to Bardy and avoid chaos on April

8 with the troupe possibly stranded in Las Vegas [Rep. Tr. 2503-2509, to line 24].

During the week of April 1 to 8, 1959, Gerber “hounded” “four or five times a day” Holmes and Durieux regarding the promised replacements [Rep. Tr. 2510, 2511; Pltf. Ex. 493]; tried to prevail upon Caire and Morrison to remain with the show [Rep. Tr. 2510, lines 16-23]; argued with the AGVA representatives to refuse to support Katleman’s position [Rep. Tr. 2514, line 1, to 2515, line 2] and was told by Holmes that Bardy was on his way from Paris and would stop in New York to argue his case with AGVA. Bardy, Holmes said, would arrive in Las Vegas on April 6 [Rep. Tr. 2511, lines 3-9]. But Bardy never arrived.

Replying to Gerber’s letters of March 20 and 26, advising Bardy of all of the difficulties, Bardy cabled Gerber on April 1, 1959 that he “regretted” any misunderstanding but gave Gerber no explanations or instructions [Pltf. Ex. 225]. On April 2 and 3, 1959 Bardy wrote Gerber [Pltf. Ex. 225, 226, 231, 231] twice and cabled him twice regarding Katleman’s demands. Those letters, being in French, were received two or three days later, given to Peter Holmes to translate, and were actually received by Gerber even later [Pltf. Ex. 496]. The April 2 letter from Bardy dealt principally with financial disputes between Bardy and Katleman and blamed the alleged extra costs under the original contract on the extravagance of Charles Henschis [Pltf. Ex. 231]. The April 3 letter from Bardy to Gerber acknowledged receipt of Gerber’s letter of March 26 regarding replacements. Bardy stated that he was quite ready to make some replacements, that he had a beautiful “nude dancer” as a replacement and that he stood ready “to do the impossible”—all provided Katleman would (1) come to Paris to approve the replacements, (2) hold Bardy harmless from any claims



made against Bardy by the girls who were to be replaced and (3) pay the transportation costs. He made no mention of a replacement for Caire or Morrison [Pltf. Exs. 232, 234].

On April 6, 1959 Stein of MCA's Paris office wrote Gerber protesting Katleman's position and expressing amazement that AGVA would go along with Katleman unless, *in fact*, Bardy failed to deliver the show as agreed on April 8 [Pltf. Ex. 478; MCA Ex. ER]. He regarded Katleman's pressures prior to April 8 as "strong arm methods" [Pltf. Ex. 478]. In fact, AGVA had already decided to go along with Gerber's demands that the Guild not declare an anticipatory breach and to hold off until April 8 to see whether Bardy would perform [Rep. Tr. 2142, 2143]. On April 6 Bardy cabled MCA in Las Vegas protesting Katleman's threatened cancellation of the extension contract and calling upon Gerber and AGVA to defend his position [Pltf. Ex. 239].

Also on April 6, 1959, El Rancho Hotel Operating Co. gave notice to MCA that it was exercising an option on the show for 1960 pursuant to the terms of the original contract between El Rancho and La Nouvelle Eve Corporation [Pltf. Ex. 238]. This notice was sent to La Nouvelle Eve Corporation and Bardy by Gerber on April 7, 1959 [Pltf. Ex. 240].

On April 7, 1959, Janine Caire and Aleta Morrison, in company of Matt Gregory, Caire's manager [Pltf. Ex. 306] left Las Vegas for Los Angeles, California [Rep. Tr. 894-895]. Caire had demanded a higher salary and new costumes to perform during the extension period and testified these were denied her by Bardy. As stated before, Bardy had refused to send any of the agreed-upon replacements unless Katleman came to Paris to see them. On April 7, Bardy called Durieux to contact the French consul [Pltf. Ex. 242].



**F. The April 8, 1959, Cancellation of  
the Show by Katleman.**

At show time on April 8, 1959, the first day of the run under the March 6 extension agreement, the security police at El Rancho Vegas Hotel refused to let the show go on [Rep. Tr. 2515-2517, line 16]. Present at the time besides the cast were Gerber, Holmes (with an attorney for Bardy) and Haettel, the AGVA representative [Rep. Tr. 2515; Pltf. Ex. 247]. Absent were Caire, Morrison and the promised replacements. Those present were told that because of the absence of Caire and Morrison and the failure of Bardy to send the replacements, the show was cancelled [Rep. Tr. 2515-2516]. Gerber protested [Rep. Tr. 2518-2519, line 19] and demanded that the AGVA official present, Haettel, rule whether the cancellation was proper [Rep. Tr. 2520, lines 6-14]. Haettel refused to do so on the ground that his superior in AGVA, Mr. Mazzei, Western Regional Director, would be in Las Vegas the next morning and could review the matter [Rep. Tr. 2520, lines 14-16].

On April 8 or 9 [Pltf. Ex. 244] Durieux cabled Bardy of the events of April 8 at the El Rancho Vegas Hotel and advised Bardy to contact AGVA for a ruling. Gerber, on April 9, sent Haettel copies of Bardy's letters of April 2 and 3 [Pltf. Exs. 231, 232], saying that these would help Haettel in seeing both sides of the dispute [MCA Ex. MX].

On April 9, 1959, Mazzei of AGVA arrived and after reviewing the events with Haettel, advised Gerber that Bardy was in breach and that arrangements would have to be made to return the troupe to Paris [Rep. Tr. 2521, line 23, to 2522, line 5]. On April 10, Gerber wired Stein in Paris stating AGVA's ruling, saying that Bardy's expected presence would have helped, and requesting Stein to arrange with Bardy for the

troupe's return [Pltf. Ex. 264]. The same day, Bardy sent Durieux a "confidential" cable telling Durieux to return the troupe to Paris [Pltf. Ex. 269].

**G. Negotiations for a Modified Extension  
Contract—April 8 to 15, 1959.**

In the interim, on April 8, 9 and 10, Gerber was in almost constant meetings with Haettel, Durieux, Holmes and Katleman, trying to resolve the dispute. Business at the Hotel was poor with the show's replacement, Monique Van Vooren, and Katleman decided to reconsider [Rep. Tr. 2667, line 16, to 2668, line 11]. In these later negotiations Katleman offered to resolve the dispute by resuming the show the next week with a reduced cast, without the replacements, and with a reduction in Bardy's participation from \$5,000 to \$2,000 a week for the term of the extension contract [Rep. Tr. 2538, line 11, to 2539, line 10].

On April 9, 1959, Bardy cabled Durieux that his "representative" would be in Las Vegas Monday and told Durieux to be present with the troupe every night at the El Rancho Hotel with "bailiff" [Pltf. Ex. 260]. Also on April 10, Bardy wrote Stein saying that "if" he had known about Katleman's decision to cancel the show, he would either have accepted the conditions or would have brought the show back to Paris on April 8 [Pltf. Ex. 265]. Bardy told Stein on April 10, 1959, that that was the first time he knew anything about Katleman's cancellation of the show on April 8 [Pltf. Ex. 482].

On April 10, 1959, Bardy replied to Durieux' cable of April 8 or 9 [Pltf. Ex. 269] in a "confidential" cable to Durieux, telling Durieux to return the troupe to Paris. Instead, Durieux orally accepted Katleman's offer on behalf of Bardy and agreed to call or cable Bardy for authority to sign a written contract embodying Katleman's offer [Rep. Tr. 2539, lines 13-21].

Durieux admitted accepting on behalf of Bardy, but later maintained that he was “personally shouldering” the responsibility [Rep. Tr. 292-293; *Cf.*, Rep. Tr. 2543, line 21, to 2544, line 8]. On April 11, 1959, Bardy cabled Durieux that he would not give Durieux authority to sign the new agreement until the deal was confirmed to him by MCA. At the same time, Bardy cabled Gerber for confirmation of the deal [Pltf. Ex. 270]. Gerber immediately cabled Bardy on April 11, 1959 confirming the deal and advised Bardy to accept, saying that he “honestly felt”, along with AGVA, Durieux and Holmes, that this was the only solution [Pltf. Ex. 271].\*

Acting on Durieux’ oral acceptance of Katleman’s offer, the show went back into rehearsal on April 12 after the AGVA official advised the performers they could either stay or return to Paris [Rep. Tr. 2544, line 21, to 2545, line 23]. Nine or ten of the troupe of 32 returned to Paris [Rep. Tr. 2546, lines 11-12]. On April 11, Bardy advised Stein in Paris that he found the \$2,000 “disappointing” but did not reject it [Pltf. Ex. 500]. On April 12, Henchis cabled Bardy that AGVA had ruled his dancers to be free of their contract with him and asked Bardy if he could give them work in Paris [Pltf. Ex. 273]. The record indicates no reply.

#### **H. The Period of the Modified Extension Contract—April 15 to June 2, 1959.**

On April 15, 1959, Gerber sent to Katleman a letter containing a cost breakdown on the “modified” version of *La Nouvelle Eve* [Pltf. Ex. 282]. All costs of the show were to be paid by the Hotel, with \$2,000 to be paid to Bardy. The term was for seven weeks. On

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\*Bardy’s ex-wife, who was staying with him in Paris, testified Bardy told her to wire Durieux, “I agree for \$2000 or \$2500” and that she sent the wire from Bardy’s apartment [Rep. Tr. 1767-1770].

April 16, 1959, Durieux cabled Bardy that the troupe had "restarted" that day [Pltf. Ex. 284].

The events during the period from about April 1 to April 10, 1959, caused Stein and Gerber to engage in an exchange of cables and memoranda explaining to each other from their distant vantage point what was transpiring and why [Pltf. Exs. 438, 294, 493, 494, 495, 496, 497, 500, 501; MCA Ex. MZ, NA]. These cables and memoranda show that Bardy disclaimed to Stein knowledge of facts which Bardy clearly had, blamed Gerber for "disappearing" contrary to the facts, and leading Stein to be extremely critical of Gerber, for which Gerber demanded an apology and, which, when all the facts were known to Stein, he received.

On April 20, 1959, Stein wrote Gerber after a meeting with Bardy saying that as soon as the contracts for the extension were received either Bardy would sign them or authorize Durieux to do so [Pltf. Ex. 494].

On April 22, 1959, Stein wrote Gerber that Bardy was contemplating legal action against all of the parties [Pltf. Ex. 294]. On or about May 1, 1959 [Pltf. Ex. 496], Robert Broder, attorney for a Mr. Kindler, then said to be the owner of La Nouvelle Eve, contacted Gerber, taking the position that Durieux had no authority to accept the offer for the modified extension contract [Pltf. Ex. 95]. On May 6, 1959, Bardy through his company, l'Escarpolette, sued in Paris for "annulment" of the MCA-Bardy agency agreement and damages of ten million francs [Pltf. Ex. 310; MCA Ex. MZ].

From April 15 to June 2, 1959, the modified version of La Nouvelle Eve played out the extension contract at El Rancho Vegas. Neither Bardy nor Broder ordered the return of the troupe to Paris. Katleman refused to pay Bardy until their affairs were straightened out and on and after May 14, refused to deal with Gerber,



MCA or anyone but AGVA regarding moneys alleged to be due Bardy [MCA Ex. NA]. On May 25 and 26, Bardy cabled Durieux that Broder was handling the extension agreement terms with Katleman [Pltf. Exs. 326, 327].

On June 2, 1959, the show closed and the troupe returned to Paris [Rep. Tr. 2035, lines 3-19]. When they arrived, they found that Bardy's place of business was closed in Paris [Rep. Tr. 2039, lines 18-19, 2040, 2042, 2048].

**I. Negotiations for "La Nue Eve" and the Henchis Dancers: Run of the Show, July 29 to October 21, 1959.**

In Paris after the return of the troupe, including Charles Henchis, litigation ensued between Bardy and Henchis over Henchis' contractual obligations to Bardy in Las Vegas and in Paris [Pltf. Ex. 336; Rep. Tr. 2087, line 24, to 2088, line 14]. The District Court refused to permit Henchis to testify as to the outcome [Rep. Tr. 2088]. Henchis then advised Matt Gregory, that he was available with his troupe to work in the United States and Gregory, sometime on or near June 8, 1959, flew to Paris to sign Henchis to an exclusive management contract [Rep. Tr. 2051, 2700; Pltf. Ex. 334].

Representing Henchis, Gregory first tried to get Henchis' troupe into the Sahara Hotel in Las Vegas [Rep. Tr. 2334] but was not successful. Later, he entered into a contract for Henchis and his dancers to open at the El Rancho Vegas Hotel on July 29, 1959 [Rep. Tr. 2550, lines 13-19]. Neither MCA nor Gerber were parties to any of these transactions. The Charles Henchis dancers, billed as "Les Girls de Paris" played the El Rancho from July 29, 1959, until October 21, 1959 under the title "La Nue Eve", meaning "The Nude Eve", along with the Joe E. Lewis show [Pltf. Ex. 141-A, 141-B].



## J. The Present Action and Verdict Below.

Bardy did not pursue his action in Paris against MCA and it was dismissed. However, on March 15, 1961, this action for conspiracy was filed in Las Vegas against, among others, MCA and Gerber. The Complaint was amended on July 5, 1961 [Clk. Tr. 1, 140].

Insofar as Appendants MCA and Gerber are concerned, it has been Appellee's contention that on or after April 1, 1959, they jointly and severally conspired with the other Appellants or joined in an existing conspiracy with the other Appellants to (1) violate and use Bardy's property rights by Katleman's presentation of the show "La Nouvelle Eve" from April 8 to June 2, 1959, the period of the executed extension agreement; (2) cause public confusion by Katleman's presentation of a different show from July 29, 1959 to October 21, 1959 under the title "La Nue Eve"; (3) cause injury to the reputation of the title "La Nouvelle Eve" by Katleman's presentation of a different show from July 29, 1959 to October 21, 1959 under the title "La Nue Eve"; (4) deprive Bardy of the services of his performers at his club in Paris by Katleman's continued employment of certain of those performers from July 29 to October 21, 1959, and (5) breach their agency contract with Bardy [Rep. Tr. 3090 *et seq.*].

Over the objection of Appellants, the trial of the case was transferred from Las Vegas to Carson City, Nevada [Clk. Tr. 1586-1590; 1700-1701] where the trial commenced on August 5, 1963. On August 20 1963, the jury returned a verdict in two parts: one against El Ranco Hotel Operating Co., for breach of contract assessing damages of \$27,281.00; the second against El Ranco Hotel Operating Co., Beldon Katleman, MCA Artists, Ltd., Roy Gerber and Matt Gregory, assessing general damages for civil conspiracy in the sum of \$251,200 and punitive damages in the sum of \$225,000, or a total of \$476,200 on the conspiracy count

[Clk. Tr. 1875]. After denial of all post trial motions for Judgment Notwithstanding the Verdict or New Trial, this appeal followed [Clk. Tr. 2306, 2307, 2308].

#### IV.

#### QUESTIONS PRESENTED.

1. Whether the verdict and judgment of conspiracy against MCA and/or Gerber were not supported by the evidence and were contrary to law.

2. Whether the District Court erred in its instructions to the jury on the burden and order of proof in the law of conspiracy.

3. Whether the District Court erred in refusing to instruct on the “two conspiracies” and “two issues” rules and whether the verdict and judgment are inconsistent with those rules.

4. Whether Appellee suffered any legal injury to any property or contractual right and, if so, whether said injury was proximately caused by the act or failure to act of MCA or Gerber pursuant to any conspiracy.

5. Whether the award of compensatory damages in the sum of \$251,200 to Appellee is against the weight of the evidence, contrary to law, excessive, and based on speculative evidence.

6. Whether the award of punitive damages of \$225,000 to Appellee is against the weight of the evidence, contrary to law, excessive, and based on speculative evidence.

7. Whether it was error to permit the jury to consider alleged “lost profits” in determining damages.

8. Whether it was error to submit to the jury, over objection, the issue of trade name infringement under the Lanham Act.

9. Whether it was error, in the absence of any patent, trademark or copyright registration of Appellee's alleged property, for the District Court to submit a naked claim of unfair competition to the jury.

10. Whether Appellants received a fair trial or were deprived of their constitutional and statutory rights to a fair trial.

11. Whether the District Court erred in denying Appellants' motion to transfer the trial of the case to Las Vegas, Nevada.

12. Whether the District Court erred in admitting, over Appellants' objections, so-called "similar business" evidence on damages.

13. Whether the District Court erred in denying Appellants' Motions for a Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial.

14. Whether MCA or Gerber breached the agency contract with Bardy.

15. The issues regarding the Nevada Fictitious Name Statute and its application to the facts herein, whether Bardy was estopped to bring this action in his own name and whether he was the real party in interest, whether the District Court erred in refusing to stay the proceedings below for arbitration, the refusal of proffered instruction on conspiracy, misconduct of counsel, errors by the District Court Judge on admissibility of evidence, and the effect of various assignments made to Bardy during the pendency of this action are specified and argued in the opening brief of Appellants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon Katleman and are adopted herein and made a part hereof by reference.\*

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\*Appellants MCA & Gerber have included as Appendix B to this Brief, their more detailed Specification of Errors to be relied upon on appeal.

V.

SUMMARY OF ARGUMENT.

The conspiracy verdict and judgment against Appellants MCA and Gerber have no support whatever in the record and resulted from confusion, error and prejudice on the part of the jury, induced by the District Court's conduct of the case and Appellee's dragnet approach to all those involved in his business affairs. No wrongful acts were committed by MCA or Gerber; they were convicted only because as a result of their contractual relationship to Bardy, they were necessarily and inevitably involved in the tumultuous transactions between La Nouvelle Corporation and Katleman's Hotel. There is no support whatever for the necessary finding that MCA or Gerber had knowledge of or the specific intent to conspire against Bardy or to join any existing conspiracy against him.

The District Court erred in the order of presentation of the issues to the jury and in its instructions on the burden of proof. The court permitted the jury to treat civil conspiracy as a tort and then to find that one or more of five alleged wrongful acts were perpetrated by the alleged co-conspirators. The jury should have been required to find on each of the alleged wrongful acts and then determine which, if any, of the alleged co-conspirators were jointly or severally responsible. Failure to do so violated the two-conspiracies rule and the two-issues rule and is reversible error.

There was no evidence to support a finding that MCA Artists, Ltd., a corporation, was a conspirator for any purposes. The acts of Gerber, if wrongful, were not authorized and his acts were not ratified.

None of the five alleged wrongful acts done pursuant to the alleged conspiracy resulted in any damage to Bardy; none was proximately caused by any act of MCA or Gerber. The damages award of \$476,200 was based purely on speculative, remote and inadmissible



evidence. There was no breach of the extension contract causing damage to Bardy; there was no proof whatever that Bardy had a protectible trade name nor of any damage to the alleged "trade name", "La Nouvelle Eve"; there was no proof that Bardy was deprived of his performers in Paris, and there was no proof of a breach of the agency contract between Bardy and MCA. Even if any of those had been proved, and they were not, there was no evidence to support any finding that MCA or Gerber knowingly and intentionally did any act proximately causing any such injury.

The award of punitive damages in the sum of \$225,000 has no support in the record, is grossly excessive and contrary to law. In no event could the award be sustained against MCA.

Finally, Appellants did not receive a fair trial because of the transfer of the case from Las Vegas to Carson City, Nevada, over Appellants' objections, because they did not have a fair and impartial jury, because of misconduct by the trial judge, and because of the haste with which the jury decided the complex issues in the case.

The remainder of Appellants' points on appeal are contained in Co-Appellants' Brief and are incorporated herein by reference.

## VI.

### **THE CONSPIRACY VERDICT AND JUDGMENT AGAINST APPELLANTS MCA AND GERBER ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO LAW.**

#### **A. Civil Conspiracy Is Not an Actionable Tort and Liability Requires Proof of the Commission of Independent Legal Wrongs by the Parties to Be Charged.**

The District Court erred in instructing the jury, over the objection of defendants, that conspiracy in and of



itself is an actionable tort [Rep. Tr. Pre-Trial Conf. 101, 105]. Under the court's instructions, the jury was lead to believe that the mere combination of persons for the purpose of committing an alleged wrongful act was actionable in itself, rather than instructing the jury that it must find one or more *independent torts*, each element of which was established by the evidence, before it reached the conspiracy issue as a means of establishing joint liability for those separate and independent torts (*Dixon v. City of Reno*, 187 Pac. 308 (Nev. 1920)).

In its instructions, the court throughout treated the conspiracy cause of action as one for tort rather than as one of multiple liability for independent torts. It consistently treated conspiracy as though it were a separate offense as it is in *criminal law* and, statutorily, under the anti-trust laws. However, the vast majority of jurisdictions today hold that conspiracy is *not* an independent tort (*Goldfield Consolidated Mines Co. v. Goldfield Mines Union*, 159 Fed. 500, 517 (D. Nev. 1908); *Bricton v. Woodrough*, 164 F. 2d 107 (8th Cir. 1947), cert. den. 334 U.S. 849, 68 S. Ct. 1500, 92 L. Ed. 1772 (1947); *De Bobula v. Goss*, 193 F. 2d 35 (D.C. 1952); *Rutkin v. Reinfield*, 229 F. 2d 248 (2nd Cir.), cert. den. 352 U.S. 844, 77 S. Ct. 48, 1 L. Ed. 2d 60 (1956); *Radford v. United States*, 264 F. 2d 709 (5th Cir. 1959); *Carlton v. Manuel*, 187 P. 2d 538 (Nev. 1947); *Agnew v. Parks*, 172 Cal. App. 2d 756, 343 P. 2d 118 (1959)). Where two or more persons are sued for a civil wrong, "*it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action.*" (*Mox, Inc. v. Woods*, 202 Cal. 675, 262 Pac. 302 (1927) (Emphasis added)). Thus the court was in error in stating repeatedly "Conspiracy is a tort." The Restatement of Torts does not recognize conspiracy as a tort. Section 765 of the Restatement of Torts recognizes an inde-

pendent tort called “Concerted Refusal To Deal” with its own elements and defenses arising from the boycott cases, but a tort called “conspiracy” is non-existent under modern law. The court seriously and prejudicially misled the jury by instructing it that if it found a conspiracy it need not proceed further to determine whether the independent tort and contract causes of action had been proved [Rep. Tr. 3088, 3108, line 16, to 3124, line 19; 3200, lines 7-25; 3202, line 5].\* Such instructions were at worst plain error and at best prejudicially confusing.

Properly, the court should have reversed the order of its instructions as requested by defendants so as to require the jury to make express findings on each of the alleged tortious acts and contract breaches. It should then have instructed the jury that if they found liability on one or more of those causes of action, then they could determine under the rule of conspiracy which of the multiple appellants participated in each such wrong or had responsibility for such wrong vicariously.

## **B. The Law of Conspiracy: Knowledge, Specific Intent and Burden of Proof.**

Even under the District Court’s instructions to the jury on conspiracy requiring that each element thereof be established by a preponderance of the evidence (which instructions are erroneous and unfair to Appellants as set forth in the brief of the other Appellants), there was clearly no evidence to support a finding of conspiracy on the part of either MCA or Gerber.

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\*The District Court instructed: “Now, if you find in favor of plaintiff on the conspiracy claim, it will not be necessary for you to go any further. In other words, if you find for the plaintiff on the claim for damages of civil conspiracy, you will not consider any of these other matters [e.g. breach of contract, infringement of trade name, deprivation of employees, etc., the independent torts alleged.] . . . because the damages claimed there are the damages which the plaintiff says proximately resulted from this conspiracy.” [Rep. Tr. 3108, lines 16-24].

The District Court instructed the jury regarding the definition of a conspiracy and with respect to the *specific intent* necessary to establish a conspiracy. Most importantly, the District Court instructed the jury that:

“Mere similarity of conduct among various persons and the fact they may have associated with each other and may have assembled together and discussed common aims and interests does not establish proof of the existence of the conspiracy.”  
[Rep. Tr. 3082].

The reason for this *individual and specific intent* rule was well stated by Mr. Justice Jackson, and is particularly appropriate to this case. He said:

“A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.”

(*Krulewitch v. United States*, 336 U. S. 440, 454, 69 S. Ct. 716, 93 L. Ed. 790 (1959)).

It was stipulated that MCA and Gerber properly and faithfully performed all of their duties under their agency contract with Bardy until on or about April 1, 1959 [Rep. Tr. 2354-2355]. Up to that point, concededly, all of Bardy's difficulties were with Katleman, El Ranco Hotel Operating Co., Henchis, Gregory, Claire and Morrison, not with MCA or Gerber.

To support the jury's verdict under the District Court's instructions, therefore, Bardy was required to establish by a “preponderance of the evidence”, *i.e.*, by proof that “something is more likely so than not so” [Rep. Tr. 3066] that (1) on or about April 1, 1959, MCA and Gerber, jointly or severally, knowingly and intentionally, and with a specific intent to commit specific unlawful acts, entered into an agreement with one

or more of the other alleged conspirators, or, (2) knowingly and intentionally and with the same specific intent, joined a pre-existing conspiracy to do specific unlawful acts (*United States v. Falcone*, 310 U.S. 620, 60 S. Ct. 1075, 84 L. Ed. 1393 (1940)). As the District Court instructed the jury, it is not the illusion of conspiracy which may arise from similarity of conduct, association or purpose that establishes a conspiracy; (*Canella v. United States*, 157 F. 2d 476 (9th Cir. 1946); *B. F. Goodrich v. Naples*, 121 F. Supp. 345 (S.D. Cal. 1954)); there must be an *agreement* between two or more persons with *specific intent* to commit *unlawful* acts.

Since a charge of conspiracy comes down to us “wrapped in vague but unpleasant connotations” and “sounds historical overtones of treachery, secret plotting and violence on a scale that menaces social stability” (*Krulewitch v. U.S.*, *supra*, at p. 448), it is absolutely essential that the Appellate Court prevent unjustified inferences to be drawn from the facts of record.

In *Cowie v. Local Union No. 1849, United Brotherhood of Brotherhood of Carpenters and Joiners of America* (316 P. 2d 473, 476 (Sup. Ct. Wash.)), the court said:

“While it is recognized that a conspiracy may be and usually must be proved by acts and circumstances sufficient to warrant an inference that the defendants have reached an agreement to act together for the purpose alleged, the test of the sufficiency of the evidence is that the facts and circumstances relied upon to establish the conspiracy *must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy.*” (Emphasis added).

(See also: *Robinson v. Stevens*, 249 F. 2d 731 (9th Cir. 1957); *Asheim v. Pigeon Hole Parking, Inc.*, 175 F. Supp. 320 (D.C. Wash. 1959); *United States v.*



*Univis Lens Co.*, 88 F. Supp. 809, 813 (S.D.N.Y. 1950)).

Under this rule it is incumbent upon the Court itself to consider each fact and circumstance alleged to establish and to deny the conspiracy (*Brooklyn National League Baseball Club v. Pasquali*, 66 F. Supp. 117 (E.D. Mo. 1946); *Seaboard Surety Co. v. Permacrete Constr. Co.*, 130 F. Supp. 184 (E.D. Pa. 1954); *Fife v. Great Atlantic & Pacific Tea Co.*, 52 A. 2d 24 (Pa. 1947)). The court must assure itself that the jury did not rely upon inference to supply facts where the rule requires that the facts supply the inference (*Heekin Can Co. v. Kimbrough*, 196 F. Supp. 912 (W.D. Ark. 1961)).

As the District Court has indicated in these proceedings below, so-called "conscious parallelism" is not sufficient, and this is especially true where, as here, by virtue of the continuing contractual and business relationships between Appellee, on the one hand, and various of the Appellants on the other, consciously parallel activity is inevitable. In a conspiracy case charging, for example, unlawful involvement in narcotics, prostitution, etc., once two or more defendants have been factually linked to those *malum in se* activities, it may be reasonable to infer knowledge, intent and unlawful purpose. Where, however, two parties are linked to one another simply by virtue of participation by contract or business relationships in ordinary lawful, commercial activities, albeit stormy ones, it is wholly unreasonable to infer a conspiracy. In the narcotics situation, often but one inference can be drawn; in the commercial transaction situation, any number of inferences may be drawn which may be equally consistent. As indicated from the cases cited above in the commercial transaction situation, the evidence of the unlawful agreement and the knowing and willful participation therein must be proved by clear and unequivocal evidence and the facts must permit but one inference—that



of unlawful activity. (*Direct Sales Co. v. United States*, 319 U.S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674 (1942)).\*

\*In *Direct Sales Co. v. United States*, *supra*, the issue was whether the evidence supported a conspiracy against a pharmaceutical house supplying narcotics in large quantities to a certain doctor. The main defense was based on the ruling of the *Falcone* case (*United States v. Falcone*, 109 F. 2d 579 (2d Cir. 1940)) where the court had held that the supplier of ingredients for the operation of a still was not guilty of conspiracy merely because he *had knowledge* of the unlawful purpose of the purchases. However, in *Direct Sales*, the issue was whether there was *more than mere knowledge*, i.e., whether there was an agreement and a stake in the venture in a case involving narcotics, known to be dangerous and restrictive. In dealing with the two situations in *Falcone* and *Direct Sales*, the court said:

"This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to know that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *United States v. Falcone*, *supra*. \* \* \* Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. Ibid. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." (319 U.S. at 711).

In the instant case the parties were dealing with the ordinary matters of their trade and occupations, not with contraband known to be illegal. Again the court's language in *Direct Sales* is most meaningful. The court said:

"The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, \* \* \* which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, become sure as to the other.

"The difference in the commodities has a further bearing upon the existence and the proof of intent. There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be

A review of the evidence of the actions of MCA and Gerber from April 1, 1959, will clearly demonstrate that (1) their actions were not, in fact, consistent only with an unlawful or dishonest purpose; and (2) that if there was any existing conspiracy among the other Appellants, prior to, on, or after April 1, 1959, neither MCA nor Gerber had knowledge of the conspiracy nor any intent to join it, and that MCA and Gerber's conduct in relation to the other parties hereto was motivated and necessitated by their contractual and business relationships with Bardy. Clearly their acts were not consistent only with an intent to join in a conspiracy against Bardy.

**C. The Evidence Does Not Support a Finding That MCA or Gerber on or After April 1, 1959, Entered Into or Joined a Pre-existing Conspiracy.**

**1. The Period From April 1 to June 2, 1959.**

It bears repeating again that Bardy stipulated at the trial that both MCA and Gerber fully and faithfully performed all of their duties under the Bardy-MCA agency contract at least up to April 1, 1959 [Rep. Tr. 2354-2355]. The events occurring prior to April 1, 1959, have been summarized in detail in the *Statement of Facts, supra*. It need only be repeated here that the relationship between Bardy and Katleman had by April 1st become extremely explosive [Pltf. Exs. 186, 205, 267, 211, 213, 212, 217, 219; Rep. Tr. 230-236] and that despite Bardy's knowledge of Katleman's demands and of Katleman's threat to cancel the extension con-

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taken. Concededly, not every instance of sales of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." (319 U.S. at 712) (Emphasis added).

How much less so where there is *no evidence of any agreement* between parties to ordinary business transactions to do anything wrongful. In such a case there is no knowledge and where there is no knowledge there can be no specific intent and no conspiracy.

tract [Rep. Tr. 1617, lines 17-20], Bardy did not communicate instructions to MCA or Gerber. Rather, for a period of approximately three weeks he carried on all of his disputes with Katleman through Holmes and Durieux, his representatives in Las Vegas, not through MCA or Gerber, and revealed only to those other representatives his plans and instructions regarding the promised replacements, the extension contract dispute, and what should be done in the event of a cancellation. All of this in spite of Gerber's letters of March 20, 1959 [MCA Ex. MW] and March 26, 1959 [Pltf. Ex. 475] requesting from Bardy information regarding the promised replacements and telling Bardy of Katleman's worsening attitude.

On April 1, 1959, Katleman demanded from Gerber, in writing, a statement as to whether Bardy had or had not made arrangements for the promised replacements [Rep. Tr. 2503-2509]. Gerber had just learned from Holmes of Bardy's provocative letter to Holmes saying that he would not send any replacements unless Katleman came to Paris to approve them, would agree to hold Bardy harmless, and pay the transportation costs [Pltf. Ex. 217, p. 3]. Gerber wrote Katleman on April 1, 1959, that to date he had not been able to get "anything definite" from Bardy about any of the replacements [Pltf. Ex. 222, p. 3]. When Gerber delivered the letter to Katleman he learned that Katleman, that same day, had obtained from Caire and Morrison letters stating that neither had made any agreement to remain with the show during the period of the extension agreement [Pltf. Ex. 222, pp. 2, 5]. Katleman told Gerber that in his opinion Bardy was guilty of an anticipatory breach of the extension contract because of his failure to send the promised replacements and to obtain contracts from or send replacements for Caire or Morrison. Katleman told Gerber that his purpose in obtaining the letters was to send them to AGVA so that the ques-

tion of the hotel's contractual relationships with Bardy's corporation could be acted on by the organization having jurisdiction over such disputes. An argument ensued between Gerber and Katleman as to whether there was in fact any anticipatory breach, with Gerber telling Katleman that he could not unilaterally declare a breach of a contract that was to commence eight days later [Rep. Tr. 2506-2514]. However, the same day Katleman wrote Jackie Bright of AGVA in New York, sending him the extension contract, Bardy's March 6, 1959 side letter, along with the letters obtained from Katleman, Caire, Morrison and Douglas. He requested that AGVA "justify" his position that there was an anticipatory breach [Pltf. Ex. 222, p. 1]. Gerber obtained copies of the Katleman letter to Bright, along with its enclosures, and sent them to Paul Sherman, MCA's house counsel in New York [Pltf. Ex. 477; Rep. Tr. 2503-2505] saying that as things stood between Bardy and Katleman there was not much hope for the show being held beyond April 7th, and that if AGVA upheld Katleman's position, there would be no choice but to go along with Katleman and close the show out [Pltf. Ex. 477].

At this point, are Gerber's acts any more consistent with a conspiracy than with the ordinary conduct of an agent confronted with an unhappy and recalcitrant hotel operator who is not satisfied with the agent's client? Should Gerber have lied and said the replacements had arrived or were guaranteed? By no stretch of the imagination could Gerber be said to be conspiring with Katleman. In Katleman's eyes, the deal had gone sour. Bardy had not performed as promised and Katleman was calling a breach. Was it incumbent *at that time* for Gerber, *at his peril*, to determine correctly what AGVA in an arbitration or a court at some future date might hold as to the rightness or wrongness of Katleman's position? Would it have been legally a



wrongful act of any sort even if Gerber agreed with Katleman? If he had agreed, would that be any more consistent with a charge of conspiracy than with the exercise by an experienced agent of his own judgment of the facts as he saw them? And even if that judgment were mistaken, he cannot be said to have conspired.

Is Gerber's conduct in sending Sherman the Katleman letters to Bright the "secretive" and "clandestine" act of a co-conspirator? Here is an agent on the scene in Las Vegas. His principal is in New York, nearly two thousand miles away, and his client is in Paris, nearly six thousand miles away. His client has been elusive, uncommunicative and uncooperative with full knowledge of Katleman's requirements, right or wrong. When Gerber is advised that Katleman intends to stop the show on April 8, 1959, he sends the full particulars to his legal department in New York. Again, is this the conduct of a conspirator? Is this conduct more persuasive of an inference that Gerber on April 1, 1959, was conspiring with Katleman than of the inference that he was concerned about his client and anxious to avoid trouble for him, as he testified? [Rep. Tr. 2503-2509]. Was there reason to be concerned? Gerber was not only the agent for Bardy personally, but also the person to whom the thirty-two members of the non-English speaking cast from Paris, looked for guidance and protection. Bardy was in Paris; Gerber was in Las Vegas with thirty-two people who might well be stranded, jobless and without means, if Katleman's threat were carried out on April 8. Bardy had sent Durieux, another representative, to Las Vegas just a few days before, and Gerber expected, as did Katleman, that Durieux would bring the promised replacements with him. This hope was frustrated when Durieux arrived without them [Rep. Tr. 2509]. Gerber's own statement of his reasons for feeling that he was forced to go along



with Katleman is enough in itself to negate any conspiracy notion [Rep. Tr. 2503-2509].

From April 1, when Katleman made known his threat to cancel the extension agreement on April 8, did MCA or Gerber commit any act consistent only with the inference that either or both were engaged in a conspiracy? Gerber testified without contradiction that in addition to sending a copy of his April 1st memorandum and attachments to Sherman, he sent the same documents to Stein in Paris, who was in contact with Bardy, he “hounded” Holmes and Durieux regarding the contract situation with Caire and Morrison [Rep. Tr. 2510, 2511; Pltf. Ex. 493], and attempted to convince Morrison that she should stay [Rep. Tr. 2510] but she refused for personal reasons and told Gerber that Bardy knew all about her situation [Rep. Tr. 2510]. He argued with and prevailed upon AGVA not to support Katleman’s anticipatory breach theory [Rep. Tr. 2514-2515; 2142-2143]. Most importantly, within two or three days Holmes informed Gerber “not to worry, Mr. Bardy was on his way,” that Bardy would stop in New York for a meeting with AGVA and would arrive in Las Vegas, Monday, April 6 [Rep. Tr. 2511]. Do Gerber’s attempts to advise MCA’s New York and Paris offices of Katleman’s threat, his attempts to persuade Caire and Morrison to stay on, his hounding Holmes and Durieux, his arguing with and prevailing upon AGVA, reflect the actions of a man conspiring with Katleman against Bardy? Are they *more* consistent with a theory of conspiracy than with a theory of a frustrated agent caught in a difficult situation trying his best to keep his client’s show going?

Bardy’s letters of April 3rd to Gerber [Pltf. Ex. 232, 234] expressed a “willingness” to make necessary replacements if Katleman came to Paris, held Bardy harmless, and paid the transportation costs. He still made no mention of Caire’s or Morrison’s contracts, and stated

that if “La Nouvelle Eve” continued in the United States he would have no difficulty putting together a different troupe for the opening of his night club in Paris that summer.

Meanwhile, in Paris, David Stein received a copy of Gerber’s letter of March 26, 1959 [Pltf. Ex. 475] and a copy of Gerber’s letter to Paul Sherman of April 1, 1959 [Pltf. Ex. 477]. According to Bardy’s testimony, he visited Stein’s office on April 3, 1959 to discuss his problems with Stein [Rep. Tr. 1319-1322]. On April 6, 1959 Stein responded to Gerber’s prior correspondence saying “We were completely amazed to receive your advice that Katleman was intending to get AGVA to go along with him, as a means of support, in order to gang up on Bardy, leave his troupe stranded without notice and closing them out without reaching any sort of agreement with Bardy to do this, notwithstanding the fact that Katleman has signed agreements which are in Bardy’s possession, covering the extension.” [Pltf. Ex. 478]. The incensed attitude of Stein is particularly noteworthy on the issue of MCA’s alleged participation in any conspiracy. It is also worth noting that Stein’s reaction to Katleman’s April 1st threatened cancellation was the same as Gerber’s—he can’t do it “*unless* they actually did refuse to perform, which would then be a breach of Bardy’s agreement to deliver a show.” Stein, like Gerber, was of the opinion that if on April 8 Bardy did not deliver the show as promised with certain replacements, especially Caire and Morrison, there *probably would be* a breach of the contract. Even if Gerber and Stein were wrong in their lay opinions in this regard, such a mistake of fact or law surely cannot form the basis for an inference of participation in a conspiracy (*Landen v. United States*, 299 Fed. 75 (6th Cir. 1924); *Linde v. United States*, 13 F. 2d 59 (8th Cir. 1926)). Stein further said that he was at a loss to understand Gerber’s statement that MCA would have to “go along with Katleman in view of the attitude of the

cast.” Here it is clear that in Stein’s view Katleman’s position was untenable *unless* there was an actual breach by Bardy or his performers. Does Stein’s statement “if Katleman really goes through with these strong arm methods . . . there will be plenty fur flying . . . to which I will not blame Bardy going to every length to secure damages” sound like the words of a conspirator against Bardy?

On April 6, 1959 by letter from Katleman to Gerber, Katleman exercised his option to have the show return for an engagement the following year [Pltf. Ex. 238] further demonstrating both Katleman’s and Gerber’s belief that Bardy would appear as he said he would and make good on his promises of replacements before April 8th.

April 8th came; Bardy and the replacements did not. The Hotel security guard advised the performers present that the show could not go on [Rep. Tr. 1224, lines 7-22; 2525, line 10, to 2518, line 17, 2519, line 18, to 2520, line 15]. Gerber’s testimony regarding the events of that night is set forth in full in Appendix C herein. In summary, however, Holmes proposed that he go on for Janine Caire and sing “Oh, My Man I Love You So”, and Jennife Till, a lesser dancer, would go on in Aleta Morrison’s place. All of this was witnessed by Bardy’s attorney, Russell B. Taylor, a Las Vegas attorney, hired by Bardy to “call the roll” [Pltf. Ex. 247] on April 8 and to witness the events [Rep. Tr. 1217-1221 to line 3]. Haettel of AGVA was also present, and Gerber asked him whether he would rule on whether there was a breach of contract. Haettel refused, preferring to wait for the arrival of Irvin Mazzei, Western Regional Director of AGVA, the next day [Rep. Tr. 2519, line 18, to 2520, line 15]. In place of “La Nouvelle Eve”, Monique Van Vooran and Jack Wallace who went under contract to the Hotel, went on [Rep. Tr. 2535, line 25, to 2536, line 12].

Durieux cabled Bardy on April 8th of Katleman's position and that AGVA had declared the contract breached because the troupe was incomplete. Durieux advised Bardy to contact personally the AGVA representative in New York [Pltf. Ex. 244].

In the meantime, Caire, acting on the advice of her manager, Gregory, left Las Vegas on April 7 in the company of Gregory and Aleta Morrison who did not renew her contract with La Nouvelle Eve show [Pltf. Ex. 480, Rep. Tr. 405; Pltf. Ex. 534, Rep. Tr. 896]. Clearly under the law, Gregory, as Caire's manager, was privileged to advise her not to continue an existing contract or enter into a new one (*Imperial Ins. Co. v. Rossier*, 18 Cal. 2d 33 (1941); Restatement, Torts §§771-772). There is *no evidence* in the record indicating that either Gerber or MCA had any knowledge of or in any manner participated in these acts by Gregory, Caire and Morrison.

The very next morning, April 9th, Gerber sat down and wrote to Haettel, the AGVA representative, saying in part: "Enclosed herewith are copies of two letters which are English translations made by Peter Holmes of the two letters I received from Mr. Bardy, written in French. *These will perhaps help some in seeing both sides* of the picture concerning La Nouvelle Eve show at the El Rancho Vegas." [Rep. Tr. 2521]. The two letters from Bardy attached contained Bardy's complaints against Katleman [MCA Ex. MX]. Specifically these letters from Bardy took exception to Katleman's billing of costs against the show, blamed cast problems, Charles Henchis and stated Bardy's belief that Katleman was trying to punish Bardy for having left Las Vegas earlier without seeing Katleman. Here, then, on April 9, 1959, the day after Katleman refused to let the show go on and before AGVA had officially ruled on the question of breach, is Gerber, acting as agent for Bardy, placing Bardy's side of the story before the local AGVA repre-



sentative in *writing* so that the AGVA decision of the breach question could be made with Bardy's position before them. Again is this conduct consistent only with a theory of a conspiracy against Bardy? How could Gerber be a conspirator and Haettel not be? Isn't Gerber's conduct absolutely consistent with and doesn't it require a finding that Gerber was representing Bardy's interest the very best he could at the time *against* Katleman?

On April 9, Holmes tried to reach Bardy by telephone, in Mazzei's presence, but was told Bardy would not be available until the afternoon of April 10 [Rep. Tr. 2228, line 5 to 2230, line 25]. Gerber was informed the same day by Mazzei that "as far as he was concerned, a breach had occurred" and Mazzei instructed Gerber to arrange to return the troupe to Paris [Rep. Tr. 2522]. At that point Gerber wired David Stein in Paris advising him of AGVA's support of Katleman, AGVA's refusal to allow the troupe to play elsewhere, and expressing his disappointment that Bardy did not arrive as expected prior to April 8 [Rep. Tr. 2522, Pltf. Ex. 264]. Gerber saw no alternative to making arrangements for return of the troupe as Mazzei had directed. The same day, Bardy cabled Durieux that his representative would be in Las Vegas April 13th and told Durieux to be present with the troupe and a bailiff every night [Pltf. Ex. 260].

On April 9, 10 and 11, Gerber was in almost continuous meetings with Haettel of AGVA, Durieux and Holmes, Bardy's representatives, Henchis, the ballet director, and Katleman, trying to persuade Katleman to change his position on the contract so that the thirty or so stranded people could work [Rep. Tr. 2538]. In the interim, on April 10, Bardy sent Durieux a "confidential" cable saying that his representative would not arrive on the 13th, telling Durieux to return the troupe to Paris and to obtain a "discharge" from individuals



desiring to stay on after April 8 at the El Rancho Vegas [Pltf. Ex. 269]. This information was not conveyed to Gerber or MCA. Some 24 to 36 hours after the April 8 cancellation, Katleman said he would continue the show starting the following Wednesday "if a price adjustment was made in the show" [Rep. Tr. 2538]. Here again Gerber's conduct is entirely consistent with good faith efforts on behalf of Bardy and his troupe and not with any theory of conspiring with Katleman. As Gerber explained, since the other performers were working for AGVA scale, the only person who would be likely to take a reduction in income to preserve the show was Bardy. The suggestion was made by Katleman to Bardy's representatives, Holmes and Durieux, that Bardy agree to accept \$2,000 a week during the extension period [Rep. Tr. 2538-2539]. Does Gerber's recommending that Bardy accept Katleman's \$2,000 offer indicate bad faith on Gerber's part or establish that he was conspiring with Katleman? Not at all. The cancellation of the show was an accomplished fact which Gerber could not alter. Katleman's reason for making the new offer was the result of Katleman's own miscalculations. He had a new show ready to go in on April 8 when he refused to permit Bardy's show to go on. The replacement was the Monique Van Vooren show which caused "quite a bit of loss of business." [Rep. Tr. 2529]. "Katlman was complaining bitterly" about the show [Rep. Tr. 2529] and told Gerber that if an agreement could be worked out for the resumption of "La Nouvelle Eve" at a reduced rate with a reduced cast he might be able to recoup some of his loss from the substitute show [Rep. Tr. 2529]. Further, *if*, in fact, Katleman was in error on April 8 and there was not a breach, he faced the likely possibility of being sued for breach of contract in which event Bardy, and perhaps Gerber, as his agent, owed a duty to mitigate the damages from such a breach to the ex-

tent possible. An arrangement whereby all those desiring to work would be allowed to do so and whereby Bardy would receive \$2,000 rather than nothing cannot be said to constitute evidence of a conspiracy. If it were, then any discussions looking toward an amicable settlement of differences or acts to mitigate damages would in every case constitute a conspiracy. Further, Bardy had told Gerber that he could easily put together another cast for Paris if the Las Vegas extension worked out.

In the interim, as noted above, on April 10, 1959, Bardy, in a "confidential" cable to Durieux said to return the troupe immediately [Pltf. Ex. 269]. Also on April 10, Gerber cabled Stein that the troupe would have to return [Pltf. Ex. 264] so that on that date, Gerber and Bardy were in agreement [Pltf. Ex. 264]. That this was not the end of Bardy's thinking on the matter is shown by the following exchanges.

Durieux agreed to call or cable Bardy regarding Katleman's new proposition. Durieux (who did not speak English) through Holmes, informed Gerber that he had spoken to Bardy and "Bardy was acceptable to the proposition" [Rep. Tr. 2539, lines 13-17]. That the Durieux-Bardy conversation took place seems established by Plaintiff's Exhibit 272, a cable dated April 11 from Bardy to Durieux (no copy to Gerber), saying "Impossible to give authorization to sign prior to confirmation of MCA requested by cable" [Rep. Tr. 2542]. That would indicate he was replying to word from Durieux of Katleman's offer. He did not say he refused the deal or did not approve it; he merely said that he would not authorize Durieux "*to sign*" his name on a contract until MCA confirms the deal. Bardy wired MCA at the same time saying: "Durieux informs me new proposition Katleman. Please confirm directly immediately by cable. Extremely important" [Pltf. Ex. 270, Rep. Tr. 2542]. Not a word of protest regarding the offer. That *same night*, April 11, 1959, Gerber sent

Bardy the confirmation wire he requested. He told Bardy that Katelman would pay all of the performers who wished to remain for the extension period, would pay Bardy \$2,000, and said, "I respectfully advise you accept this proposition" [Pltf. Ex. 271, Rep. Tr. 2543]. He told Bardy that the modified agreement had been discussed with AGVA, Durieux and Holmes and that they "honestly feel this only solution" [Pltf. Ex. 271, Rep. Tr. 2843]. Not until the next day, April 12, did Gerber receive word from Stein in Paris that Bardy thought "The \$2,000 offer 'disappointing'". However, Bardy did not *then or ever* reject the offer [Pltf. Ex. 500] and never rejected it to Gerber. Gerber testified: "—the understanding that I had at that point was that Mr. Bardy had ok'd to Regis the extension period. . . ." [Rep. Tr. 2543]. ". . . I confirmed it to the El Rancho. . . ." [Rep. Tr. 2544]. "I must have either received a telegram or a cable or some word from Regis or Holmes" [Rep. Tr. 2544]. Gerber relied on the word of Bardy's representatives who purported to speak for him in accepting the offer [Rep. Tr. 2577-2578]. According to the testimony of Madame Deryckere, Bardy's ex-wife and continuing business associate, Bardy accepted Katleman's \$2,000 offer and she cabled the acceptance [Rep. Tr. 1769-1770], corroborating Durieux' statement at the time that he had authority to accept.

That week the show went back into rehearsal [Rep. Tr. 2544]. There was a cast meeting at which the new plans were explained. Mazzei of AGVA ruled that the performers would have to be paid half salary for the week they were off, April 8-15 [Rep. Tr. 2545]. Alternatively, they could return to Paris. Some accepted the half salary paid by Katleman [Rep. Tr. 2665], others did not and returned to Paris. The show began under what all parties believed to be the modified extension agreement on April 15, less nine or ten performers [Rep. Tr. 2546]. Bardy was so advised by Durieux



[Pltf. Ex. 284]. On April 15, Gerber sent to Katleman a cost breakdown of the modified extension agreement [Pltf. Ex. 282].

Meanwhile, in Paris, Bardy was complaining to Stein that he had not been kept informed regarding the events that had occurred in Las Vegas and claimed that Gerber's cable of April 9 to Stein [Pltf. Ex. 501], was the first information he had that Katleman would cancel the show. This is, of course, in direct opposition to the previously cited and uncontroverted *documentary* evidence showing he had full knowledge of all the facts at least from March 25th on, and was directing his people how to act without informing Gerber. When Plaintiff's Exhibit 265, being a letter from Bardy to Stein dated April 10, 1959, is laid against all the previous evidence showing Bardy's knowledge of the events in Las Vegas, his statement to Stein "If I had been told about Katleman's decision I would have either accepted the new conditions or I would have on April 8 brought back my company" demonstrates that Bardy was being completely dishonest with Stein and was attempting to put MCA in the position of having withheld facts. Exactly the converse is true as the evidence makes clear—Bardy constantly withheld information from MCA. Further, Stein's April 10 memorandum to Gerber again demonstrates the differences between Stein and Gerber making the charge that they and their employer, MCA were engaged in a conspiracy completely untenable.

On April 14, 1959, Gerber wrote to Stein twice, once outlining the financial disputes as to charge-backs existing between Katleman and Bardy, indicating Gerber's continuing efforts to protect his client's interest [MCA's Ex. NA], and once explaining to him in full detail the events that had transpired in Las Vegas [Pltf. Ex. 493]. This document in and of itself dispels any inference that any person connected with MCA was any party to any conspiracy against Bardy. The very in-

ternal MCA disagreements and differences of opinion reflected in the series of exchanges between Gerber and Stein between April 10 and April 29 [Pltf. Exs. 482, 493, 483, 494, 294 and 497] regarding the Bardy-Katleman dispute point unerringly to the conclusion that MCA was not a party to any conspiracy against Bardy. First Stein relays Bardy's absurd accusation that Gerber "disappeared" during the crucial moments in and around April 7-8 [Pltf. Ex. 482]. Stein is critical of AGVA's position, finding it "just amazing". He describes the treatment given Bardy as "pretty rough stuff". He accuses Gerber of riding along with Katleman's "blows". Is this the way of a co-conspirator or one speaking for an alleged co-conspirator?

Consider, then, Gerber's indignant reply in which he demands an apology from Stein [Pltf. Ex. 493]. Gerber had indeed not disappeared during the crucial period. In fact, as he points out to Stein, he was spending a very substantial portion of his time on this matter, doing everything in his power to force Katleman and AGVA to accord Bardy proper treatment. All of the testimony of the persons on the scene support Gerber's presence at all times.

Again, on April 17, 1959, Stein wrote Gerber complaining of Gerber's handling of the Bardy-Katleman dispute [Pltf. Ex. 483]. It is obvious that he had not yet received Gerber's memorandum just referred to written three days earlier from Las Vegas. Again Stein points out specific objections he had to Gerber's conduct, especially Gerber's perhaps misplaced reliance on Bardy's representatives in Las Vegas—Holmes and Durieux.

When Stein received Gerber's April 14 memorandum, he replied on April 20, 1959 [Pltf. Ex. 494], saying: "If the information contained therein had been received many days earlier, and if we were kept up-to-date here on the many problems you were plunged in, I would certainly never have written you as I had. It is further



proof that, when we are separated by the distance as we are, and subjected to the harassment at our end as you were at yours, in the lack of receiving information and being kept up-to-date, we are too tempted to draw the conclusions." Regarding the new contract, Stein said: "I will await receipt of the final new draft" and "Either Bardy will sign or authorize Regis to sign on his behalf." It clearly appears that Bardy again agreed to the new contract in talks with Stein between the 15th and 20th of April, the date of Stein's memorandum. Stein further added that he would now be in a position to clarify MCA's activities with Bardy and his ex-wife, and expressed his apology to Gerber for having been so critical.

Yet, two days later, after Stein had explained the situation to Bardy and Bardy was still not placated, Stein again criticized Gerber's handling of the matter [Pltf. Ex. 294]. This complete lack of harmony in the matter as between these MCA representatives further dispels altogether the existence of a conspiracy by MCA. Equally it demonstrates that, even assuming Gerber acted erroneously, his acts were not ratified by MCA. Further, as of April 22, 1959, Bardy advised Stein that he contemplated legal action against all necessary parties [Pltf. Ex. 294]. Again Gerber, on April 28 [Pltf. Ex. 497] explained to Stein that he favored accepting Katleman's new contract for the April 15 show, saying: "Even though the extension arrangements were not in complete financial benefit for Bardy, I felt that it at least solved a problem of what to do with the company and also protected him (Bardy) from any claims from his own employees for the extension he contracted with them for and through no fault of their's was breached."

On May 1, 1959, Gerber advised Stein that an attorney, Robert Broder, representing a Mr. Kindler, was in Las Vegas and told Gerber that Kindler now

headed La Nouvelle Eve, rather than Bardy. Gerber further advised Stein that Durieux now took the position that he never had authority from Bardy to accept Katleman's new offer [Pltf. Ex. 496]. On May 5, Gerber again wrote Stein of Broder's visit and his claim that Katleman, AGVA and MCA had all acted improperly against Bardy. Gerber suggested that nothing could be done on the extension agreement until Kindler agreed or advised him "what new arrangements should be made." [Pltf. Ex. 495].

With the arrival and take-over of Bardy's affairs by Broder, Gerber and MCA ceased to act for La Nouvelle Eve other than to attempt to complete their accountings under the prior Bardy contracts with the Hotel. Broder had several meetings with AGVA and Katleman but to no apparent avail. On April 30, May 25 and May 26, 1959, Bardy cabled Durieux that it appeared impossible to work out the problems and that Durieux was to discuss the matter with Broder [Pltf. Exs. 304, 327, 370].

On May 14, 1959 [MCA Ex. NA] Gerber advised Sherman that Katleman refused to negotiate with anyone but AGVA regarding Bardy and monies MCA claimed were due Bardy.

Meanwhile, on May 6, 1959, Bardy filed suit in Paris against MCA, seeking annulment of the MCA-Bardy agreement and damages [Pltf. Ex. 309]. The modified version show ran its course under the extension contract which expired on June 2, 1959, and the troupe returned to Paris. Bardy took no action to enjoin the alleged wrongful use of his performers from April 15 to June 2, 1959.

There is therefore not a shred of evidence to support the conspiracy verdict and judgment against MCA or Gerber during the period just reviewed.

## 2. The Period From June 2 to October 21, 1959.

Bardy's decision to terminate his agency contract with MCA on May 6, 1959, did not however abate his quest for revenge on MCA and Gerber. Taking facts occurring after June 2, 1959—facts which neither MCA nor Gerber could control and in which they had no participation, Bardy attempts to weave the web of conspiracy to extend it to the return of the Charles Henchis line of girls to the El Rancho Vegas Hotel on July 29, 1959, and the run of the Henchis dancers there until October 21, 1959. Three-fifths of the alleged injurious results of the claimed conspiracy occurred during this period, when MCA and Gerber were completely out of the picture.

The evidence establishes the following events: When the modified extension contract for "La Nouvelle Eve" expired on June 2, 1959, the personnel of the show returned to Paris [Rep. Tr. 2036]. When they arrived in Paris, Bardy's club was closed for repairs [Rep. Tr. 2039-2040]. Henchis, owner of the Charley Ballet which had been a part of the "La Nouvelle Eve" show in Las Vegas contacted his lawyer to determine what his rights were against Bardy, who could not be located [Rep. Tr. 2040-2042]. Henchis was told by people in Paris that Bardy would not reopen the club because of tax problems [Rep. Tr. 2048].

Henchis testified that he was advised by Matt Gregory, his personal manager, that he could obtain employment for the Henchis line of girls in Las Vegas and elsewhere when they were free to work [Rep. Tr. 2041]. When the Paris club was closed and Bardy appeared unable to provide employment for the Henchis dancers, Gregory flew to Paris to negotiate a contract with Henchis and Henchis signed a contract with Gregory [Pltf. Ex. 334] agreeing to return to the United States for bookings. This contract was dated June 8, 1959 but signed later [Rep. Tr. 2328]. It was

solely between Gregory and Henchis, with no knowledge or participation by Gerber or MCA.

Sometime between June 8, 1959 and July 29, 1959, Gregory booked the Henchis line of girls into the El Rancho Vegas Hotel, not as the major attraction but as an act on the bill with the star of the El Rancho show for that period, Joe E. Lewis [Rep. Tr. 2051, 2700]. Gregory testified that he originally hoped to put the line in the Sahara Hotel, but was not able to do so [Rep. Tr. 2334]. Again there is no evidence of any knowledge or participation in these acts by MCA or Gerber. The Henchis dancers, featuring "Les Girls de Paris" opened at the El Rancho July 29, 1959, under the title "La Nue Eve" and played through October 21, 1959.

MCA did not book this show; MCA did not receive any commission on this show; MCA did not participate in any form or manner in the arrangements between Henchis, Gregory and Katleman, whatever their rights, duties and morality might have been [Rep. Tr. 2551]. MCA had nothing to do with the selection of the title "La Nue Eve." In fact, as indicated above, MCA was being sued by Bardy in Paris at the time and would certainly not have participated in any scheme to cause damage to Bardy.

Plaintiff makes a feeble effort to connect Gerber and as a consequence, MCA, to this period of the alleged conspiracy by two widely remote, immaterial and irrelevant pieces of evidence. First, Gerber was told by Katleman at some point in July 1959, that the dance numbers in the Henchis line of girls were lackluster and there was a need for a choreographer [Rep. Tr. 2551]. MCA had a client, Paul Godkin, a choreographer, and in the performance of his duties as a talent agent (MCA represented many artists in the entertainment industry) Gerber sent Godkin to the El Rancho where he was employed for one week to work to improve the dance numbers [Rep.



Tr. 2550]. Under plaintiff's theory, Gerber and MCA, knowingly and intentionally, risked the imposition of substantial damages in the already pending and in this subsequent litigation by getting employment for another client of their's with the El Rancho Vegas Hotel. Plaintiff's theory apparently is that MCA was forever barred from seeking employment for any of its other clients at one of the six or so establishments using talent in Las Vegas at the pain of being charged with conspiracy against Bardy.

Second, plaintiff introduced wholly irrelevant and immaterial evidence that MCA as a talent agent, and Matt Gregory, as a personal manager, had a mutual client in Shaw-Hitchcock Productions, who otherwise had absolutely nothing to do with this case. The bare fact in evidence is the existence of this mutual client, a client which Gregory had represented at least *prior to* January, 1959 [Rep. Tr. 2343] and that MCA had represented prior to the Bardy affair. The exhibits themselves show that there was anything but harmony between Gregory and MCA regarding bookings for Shaw-Hitchcock [Pltf. Ex. 368 A]. Under no circumstances could the naked fact of a mutual, remote-to-the-situation-at-hand client be any evidence whatsoever of a conspiracy as to Bardy.

There is, therefore, no evidence whatever to link Gerber, let alone MCA, to any conspiracy in the period from June 2, to October 21, 1959. Since the very substantial verdict in this case must certainly have rested in substantial part on the three alleged acts by Katleman which occurred during this period, the verdict against Gerber and MCA cannot stand.



**D. If There Was Any Conspiracy Established by the Evidence, There Were Two Conspiracies and the Single Conspiracy Verdict Cannot Stand.**

If there was, in fact, any “conspiracy” in this case (and the facts conclusively show there was not as to MCA and Gerber), then clearly there were two conspiracies, one ending on June 2, 1959 with the end of the extension contract, and the other commencing on or after that date. Even if by indulging in suspicion and surmise, in guilt by association and in the pernicious doctrine of “implied conspiracy”, Gerber and MCA be charged argumentatively, although not factually, with having been said to have been a party to the first conspiracy, there is not a shred of evidence to show their knowing and wilful participation in acts alleged to have caused damage to plaintiff after June 2, 1959. And it was upon such claimed damage after June 2, 1959, that most of the gigantic sum awarded to Bardy had to be based.

Every conspiracy has a “party dimension” and an “object dimension.” Thus A, B and C may agree to operate “Murder, Inc.”, pursuant to which they agree that the organization will supply, on a continuing and indiscriminating basis, killers for hire. Such a conspiracy is one of indeterminate “object dimension” and anyone subsequently entering the organization with knowledge of its purpose “takes his chances” with respect to who will be murdered, where and how (See *United States v. Andolschek*, 142 F. 2d 503, 507 (2nd Cir. 1944) (L. Hand, J.)). On the other hand, if A, B and C conspire to illegally receive a shipment of narcotics and B, C and D illegally conspire to receive another shipment of narcotics, a single conspiracy count against A, B, C and D, with proof of the two separate acts violates the “party” and the “object” dimension concept as to A, who was

not, in fact, a party to the second agreement and as to D who was not a party to the first.

These rules of law are basic both as to the law of and to the requirements of proof in conspiracy cases and were clearly enunciated by the United States Supreme Court in *Kotteakos v. United States* (328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557) (1946)). In that case numerous defendants were convicted of a single conspiracy to violate the National Housing Act (12 U.S.C. §1702, *et seq.*), based on numerous acts of fraud in obtaining government loans. One defendant was the “hub” of the group who acted through numerous “spokes” to obtain the loans. The government charged a single conspiracy consisting of the acts of A (the hub), and the multiple overt acts of C, D, E, F, etc. There was no proof, however, that C, D, E & F agreed to or had knowledge of A’s continuing acts through each of them to obtain fraudulent loans. In such a case, the court held that there was not proof of a single overall conspiracy, but merely proof of numerous separate conspiracies and a verdict based on a single count could not stand. As the court said, the wrongful act

“must be in furtherance of the common plan; there can’t be three or four different plans. There must be one plan and all of them must bear their part.” (328 U.S. at 766, N. 21).

Further, the court held that the error was *not* cured by an instruction which told the jury that in order to convict it had to find “one conspiracy” and that the government had to prove

“each of the defendants was a member of that conspiracy. . . . the question is whether or not each of the defendants or which of the defendants are members of that conspiracy.” (328 U.S. at 767).

The jury following this instruction found each defendant guilty as a party to an overall single conspiracy,

despite the fact that this was not *clearly and unequivocally* established by the evidence. The Court said of such an instruction that it

“ . . . obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.” (328 U.S. at 769).

The problem, the Court noted, is that

“Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. \* \* \* [Conspiracy charges] call for use of every safeguard to individualize each defendant in his relation to the mass.” (328 U.S. at 773).

Under the court's instructions to the jury in the instant case, the existence of a single alleged conspiracy was presented, having as its ends and purposes five allegedly damaging acts. Those acts were (1) causing a breach of contract between the hotel and La Nouvelle Eve show for an eight week's extension of the show from April 8 to June 2, 1959; (2) causing public confusion as to the source of a production bearing the title “La Nue Eve” from July 29 to October 21, 1959; (3) injuring the reputation of the trade name La Nouvelle Eve by the presentation of a different class of performance from July 29 to October 21, 1959, under the title “La Nue Eve”; (4) depriving plaintiff of the services of his performers during the same period and (5) causing breach of the agency contract between plaintiff and MCA Artists, Ltd.

There can be no question, even under plaintiff's distorted statement of the law of conspiracy, that to support a verdict of a single conspiracy, the jury must have been able to find by clear and unequivocal evidence that the defendants MCA and Gerber knowingly agreed with the other defendants, or at least one of them, to do the five acts charged *as a part of a single plan*; otherwise the object dimension of the alleged conspiracy is frag-

mented and there is no single conspiracy. As the court said in *United States v. Aqueci* (310 F. 2d 817 (2nd Cir. 1962)) "the nature of the enterprise determines whether the inference of knowledge" of the overall plan is justified. Where, as here, the acts of the defendants are far more consistent with the ordinary business motives of each than with any intention of conspiracy and where, as here, the alleged wrongful acts by defendants MCA and Gerber can at most be said to constitute an unintentional violation of their agency contract, the language of the Supreme Court in the *Kotteakos* case, *supra*, is particularly compelling. Where one group of defendants are found to have committed one wrongful act and another group some other wrongful act, the Court said:

"The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can say prejudice to substantial rights has not taken place." (328 U.S. at 774).

The right of defendants in such a case, the Supreme Court has said

"was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record." (328 U.S. at 775).

To convict of a single conspiracy charging multiple wrongful acts, there must be clear and unequivocal proof that the original plan encompassed "the entire chain of events." (See also, *Twitchell v. United States*, 313 F. 2d 425 (9th Cir., 1963); *Montford v. United States*, 200 F. 2d 759 (5th Cir. 1952); *Brooks v. United States*, 164 F. 2d 142 (5th Cir. 1947); *United States v. Stromberg*, 268 F. 2d 286 (2nd Cir. 1959)).

There is no evidence whatsoever to support a finding by the jury that at any time MCA and/or Gerber en-



tered into an agreement encompassing “the entire chain of events” consisting of the five wrongful acts submitted to the jury as the “scope of the conspiracy.”

With the facts above stated in mind, there is another reason why the verdict of conspiracy cannot stand. The court erroneously and over the continued objection of counsel for defendants led the jury to believe that conspiracy is a tort in and of itself and that plaintiff need not prove the commission of underlying tortious acts [Rep. Tr. 3088; 3108]. Yet the court proceeded to instruct the jury on five alleged independent torts done pursuant to a conspiracy, the alleged commission of each of which resulted in damage to plaintiff. In that confused and confusing state of the instructions, the jury brought in a general verdict on conspiracy against all but two defendants, assessing \$251,200 in compensatory damages and \$225,000 in punitive damages. Since the conspiracy as such was not or could not be the tort, the jury had to have before it clear and convincing evidence that each of the Appellants committed each of the tortious acts alleged to have been committed pursuant to the conspiracy. If, as Appellants contend, there is no evidence to connect MCA or Gerber with three of the five alleged tortious acts, and if the damages for those two could not exceed \$46,000, it is patently obvious that prejudicial error was committed.

Taking first the Nevada law applicable in a diversity case, the present case is controlled by the decision of the Nevada Supreme Court in *Heinen v. Heinen* (64 Nev. 527, 186 P. 2d 770 (1947)). That was a divorce action in which there were some five grounds alleged to entitle plaintiff to a divorce. The verdict was clearly supported by substantial evidence as to four counts, but there was error as to the fifth. The case thus posed what the court referred to as “the two issue rule” on which, admittedly, there is substantial conflict of authority in various jurisdictions. According to one line of authorities, the court



noted, a substantial error affecting any one of the issues or theories in a case in which a general verdict has been rendered will be regarded as prejudicial “unless the verdict is so clearly supported by the evidence upon an issue or theory as to which no error occurred that the trial court would have been justified in directing a similar verdict thereon. At least this is true *if it is impossible to determine upon which of the issues the verdict was founded.*” (186 P. 2d at 777). Another line of cases holds to the contrary and states that if there is any ground to support the verdict that is sufficient. After reviewing the contrary authorities, the Nevada Supreme Court said:

“ . . . where two or more material issues are tried and submitted to the jury and the verdict is a general one, it cannot be upheld if there was error as to any one of the two or more issues. The reasoning of the cases supporting this rule appears to us to be the better logic . . . ” (186 P. 2d at 777).

It cannot be considered “harmless” where it is impossible to determine on which theory or issue the jury based its verdict if any one theory is not supported and the verdict is a general one.

The same rule is followed by the federal courts in non-diversity cases (*Volacco Prods. v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 393 (6th Cir. 1962); *Roth v. Swanson*, 145 F. 2d 682 (8th Cir. 1944); *National Wrestling Alliance v. Myers*, 325 F. 2d 768 (8th Cir. 1963); 3 Barron & Holtzoff, §1034 N. 40). Thus regardless of whether this be treated as a diversity case or one under the Lanham Act, the rule is the same and Appellants are clearly entitled to a new trial.

From all of the foregoing it is clear as to MCA and Gerber that the evidence shows (a) no conspiracy at all, or, ignoring such lack of evidence, (b) a “conspiracy” to breach the extension contract and/or the Bardy-MCA agency contract, but (c) no evidence whatsoever

to establish that either MCA or Gerber conspired with anyone else (1) to use the name "La Nue Eve," (2) to damage the reputation of "La Nouvelle Eve" by use of the title "La Nue Eve" or (3) to deprive Bardy of his performers. Under the general rule of conspiracy as stated, under the "two conspiracies" rule, and under the "two-issues" rule the general conspiracy verdict cannot stand.

## VII.

### **THE CONSPIRACY VERDICT AGAINST MCA ARTISTS, LTD., A CORPORATION, IS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE.**

The District Court properly instructed the jury that since certain of the appellants were corporations, it was necessary for Bardy to prove that the corporations' agent knowingly and wilfully participated in the unlawful plan with authority [Rep. Tr. 3190-3193]. The court instructed the jury to determine as to Gerber,

"... whether he had previous authority or whether the corporation subsequently knew of his conduct; if his conduct was unlawful, whether the corporation later approved it.

"So you have two possibilities here as far as authority of an agent is concerned. Did the corporation authorize him to do an unlawful act, if you find he did one, or did the corporation subsequently, with knowledge that he had done the unlawful act, ratify, as we say approve it?" [Tr. 3193].

If, contrary to all of the facts, but for the sake of argument Gerber, stipulated to be an employee of MCA, entered into or became a party to conspiracy, it was conceded in the Trial Court that there was no evidence "of any prior authorization by any corporation to an agent to do an unlawful act." [Rep. Tr. 3194]. The Dis-

strict Court therefore instructed the jury regarding the alleged conspiracy that "the question is, under the circumstances, was there subsequent ratification of it by the corporation with knowledge of what the agent had done?" [Rep. Tr. 3194].

There can be no real question that if in fact Gerber knowingly and wilfully entered into a conspiracy against Bardy, a client of MCA's, such conduct would not be authorized conduct or conduct within the scope of his employment (*Ransom v. Dollar Steamship Line*, 2 F. Supp. 409 (W.D. Wash. (1933) (Conspiracy is not within the scope of employment)). Thus the court properly instructed the jury that in order to hold MCA liable for conspiracy it would have to be on the basis that MCA ratified Gerber's acts (*J. C. Penney v. Gravelle*, 62 Nev. 434, 155 P. 2d 447 (1945)).

Ratification can be inferred only from acts which evince an intention to ratify in a clear and unequivocal manner (*United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975 (1922)). It may not be inferred from acts which may be readily and satisfactorily explained without involving any such intention (*J. C. Penney v. Gravelle*, *supra*; *Miera v. George*, 55 N.M. 535, 237 P. 2d 102).

Furthermore, knowledge by the corporate defendant of all of the material facts must be present before ratification can be found. In a case of this nature wherein the evidence establishes merely that certain other employees had knowledge of certain of the acts of Gerber by virtue of inter-office memoranda, cables, etc., there is nothing to establish knowledge on the part of the corporation of the alleged conspiracy (*Mann v. Life and Casualty Insurance Co. of Tenn.*, 129 S.E. 79 (S.C.); *Williams v. The Pullman Palace Car Co.*, 3 So. 631 (La.). Nor does, the mere retention in employment of an employee who committed a tort constitute sufficient evidence of ratification. On that issue, there can be no

doubt that this case is controlled by *J. C. Penney Co. v. Gravelle, supra*), wherein (a) the employer had full knowledge and (b) retained the tortfeasor employee in his job with the court holding that such acts did *not* constitute ratification. Clearly MCA, even with full knowledge of all the facts, could retain Gerber, defend itself in a law suit and never ratify any alleged wrongful act under Nevada law (see also, *Sullivan v. Matt*, 130 Cal. App. 2d 134 (1955)).

It bears repeating that the conduct of the other MCA agents, the conduct of the corporate principal and of all others involved, is perfectly consistent with a reasonable belief in the honesty of Gerber as an agent, with a reasonable belief that if any contractual rights of Bardy had been breached they could and would be rectified by Bardy in an action against Katleman for breach of contract and against MCA for breach of contract, without the remotest hint of a conspiracy. It was incumbent upon plaintiff, under the law, to prove that the conduct of MCA, the corporate principal, was consistent *only* with an intention to ratify and adopt Gerber's alleged conspiracy. There is no such evidence and no evidence even to support such a remote inference.

It is well established that ignorance of the facts or of the law or ignorance of the legal consequences of one's acts is a defense in conspiracy. Conspiracy is a tort in which specific intent is necessary. It is not enough to agree to do an act which is unlawful; *the unlawfulness must be known* to the conspirators. Thus in *Landen v. United States* (299 Fed. 75 (6th Cir. 1924)) a conspiracy conviction based on the violation of a liquor license law was reversed where defendants did not know of the permit requirement. In *Commonwealth v. Benesch* (290 Mass. 125, 194 N.E. 905 (1935)) the court held that the fact that the defendants charged with conspiring to violate the state's blue-sky laws did not know the legal consequences of their



act was a complete defense to the conspiracy charge. A mistake of or ignorance of such legal consequences is therefore fatal to a conspiracy verdict. (See also, *Pettibone v. United States*, 148 U.S. 197 (1893) (the recipient of a stolen car, *even if he has reason to believe it is stolen*, cannot be convicted of conspiracy to violate the National Motor Vehicle Theft Act if he knows nothing about the interstate transportation of the car); *Linde v. United States*, 13 F. 2d 59 (8th Cir. 1926)).

From the foregoing it is clear that there was no evidence whatsoever of any ratification of any alleged conspiracy by MCA, the corporate principal of Gerber.

### VIII.

#### **THE DAMAGES AWARDED ARE CONTRARY TO LAW, NOT SUPPORTED BY THE EVIDENCE AND ARE GROSSLY EXCESSIVE.**

##### **A. The Award of \$251,200 General Damages Violates the Rule Against Remote and Speculative Damages.**

On the conspiracy count involving MCA and Gerber, the jury awarded compensatory damages in the amount of \$251,200.00 and punitive damages in the amount of \$225,000.00 for a total of \$476,200.00. Such damages have no support in the record, are excessive and could only have resulted from prejudice.

The damages claimed by Bardy and found by the jury are wholly speculative. The entire price for the use of the title, production numbers, costumes, and other elements of the show was clearly established by the prior dealings between the parties and Bardy's loss, if any, by an act of any of the parties to the alleged conspiracy could not exceed Bardy's net under the established contract price. Further, Bardy had given El Rancho an option on the show, which was accepted, for the following year, at the *same net to him* [Pltf. Ex. 238]. Certainly



the only basis for liability and the best evidence on the question of damage, if any, to Bardy is the contract and the established contract price. It is clear, as a matter of law, that Bardy's first allegation of damage pursuant to the alleged conspiracy arising from a purpose of the alleged co-conspirators to "(1) violate and use Bardy's property rights by Katleman's presentation of the show 'La Nouvelle Eve' from April 8 to June 2, 1959, the period of the executed extension agreement" [Rep. Tr. 3090] could result only in a *contract theory* of liability and damages. In *Bupp v. Great Western Broadcasting Corp.* (201 Cal. App. 2d 580 (1962)), plaintiff, a television announcer, brought an action against his former broadcaster employer alleging that, after the term of his employment, video-tape recordings made by plaintiff were used by the employer without the consent of and without payment to plaintiff. The suit, in addition to an action for breach of contract, claimed unfair competition and defamation. In sustaining the trial court's dismissal of the latter two causes of action, the court held that where the parties have contracted with respect to the subject matter, a breach does not give rise to any theory of relief other than on the contract, and the contract provides the measure of damage, if any. (Accord: *Lillie v. Warner Bros. Pictures, Inc.* (39 Cal. App. 724 (1934)).

On the original contract with El Rancho Vegas, Bardy claimed he was to *gross* \$15,000.00 per week [Pltf. Ex. 90] but that was in constant dispute by Katleman, who claimed that transportation costs to and from Paris were to be paid out of Bardy's share [Rep. Tr. 2421-22]. Under the extension agreement Bardy was to *gross* \$5,000.00 per week for eight weeks [Pltf. Ex. 472]. Therefore, even if liability were established, which the evidence does not support, Bardy's damages under the extension agreement which he alleges was breached would be, at best \$40,000.00 gross.

And under the contract price, it is doubtful whether Bardy was entitled to all or any part of the \$5,000.00 per week payable to him under the contract. The very procurement of numerous "assignments" by Bardy from others claiming an interest in "La Nouvelle Eve" [see Pltf. Exs. 426, 419, 415, 438 and 439] after commencement of this action makes it clear that Bardy was not legally entitled even to the full \$5,000.00 from the contract. (See the argument on Assignments in Co-Appellants' Brief).

That the contract price is the appropriate measure of damages in an action such as this is evident from the following factors making any other measure inadmissibly speculative: *First*, there was no evidence introduced to show Bardy's past profit experience, if any, with the title "La Nouvelle Eve" which had been used by him as the name of his Paris club, not as the title for a show [Rep. Tr. 2862, lines 17-20]. *Second*, the show which became "La Nouvelle Eve" in Las Vegas was called "Shocking" in Paris and elsewhere in Europe and was not financially successful [Tr. 2071, 2089, 2076, 2082]. In fact there was a great deal of trouble with it in places like Dusseldorf [Tr. 1527, 1533]. *Third*, the show could not play elsewhere in the United States after Las Vegas because of Guild restrictions [Pltf. Ex. 509]. *Fourth*, Bardy's own associate, Peter Holmes, wrote to Bardy a week after the extension period began advising Bardy that the show was much better and that Bardy's reputation was saved [Pltf. Ex. 292]. Henchis testified that Bardy's later shows in Paris were not financially successful [Rep. Tr. 2076, 2092]. *Fifth*, the personnel of the show who remained in Las Vegas after the expiration of the original contract and through the extension contract were not essential to Bardy's continued use of the title in Paris, since he stated [Pltf. Ex. 232] he could run two shows under that title. *Sixth*, although the Charles Henchis

Dancers were allegedly obligated to return to Paris at the expiration of the original contract on April 7, 1959, had there not been an extension period, the evidence establishes that Bardy's Paris club was closed and undergoing repairs at least until the 27th of July [Tr. 803] and that he would have had to obtain employment elsewhere for his people for a considerable period of time [Tr. 802, 2039]. *Seventh*, Bardy never offered any evidence to show that he made a profit from the Las Vegas run of "La Nouvelle Eve" during either the original or extension contract [Rep. Tr. 2862, lines 17-20]. The Ninth Circuit has repeatedly cautioned against giving "judicial blessing to a decision based upon speculation, surmise and conjecture." (*Wolfe v. National Lead Co.*, 225 F. 2d 427 (9th Cir.); *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 395 (9th Cir.)). Any award of damages over and above \$40,000.00 could be based on nothing other than speculation, surmise, conjecture and prejudice.

Moreover, in Las Vegas and in the United States as a whole, Bardy's was a *new business*, without experience, without a history and without a basis upon which to calculate damages even if the business were *totally* destroyed—which it was not. The classic statement of law on the right to recover lost future profits is found in *Grupe v. Glich*, 26 Cal. 2d 680, 160 P. 2d 832 (1945), later adopted by the Nevada Supreme Court in *Knier v. Azores Constr. Co.*, 78 Nev. 20, 24, 368 P. 2d 673 (1962). In the *Grupe* case, the court states the rule as follows:

. . . where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative . . . (26 Cal. 2d at 692-693). (Emphasis added).

Where, as in the case at bar,

“ . . . a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that *they will be denied for the reason that such business is an adventure as distinguished from an established business*, and its profits are speculative and remote, existing only in anticipation. . . .” (Emphasis added).

*Handley v. Guasco* (1958), 165 Cal. App. 2d 703 at 712, 332 P. 2d 354; *Mahoney v. Founder's Ins. Co.*, 190 Cal. App. 2d 430, 12 Cal. Rptr. 114 (1961); *Hendrick v. Perry*, 102 F. 2d 802 (10th Cir. 1939).

In adopting the same rule, the Nevada court held that where one has been in business in one place and then moves to another, the loss of anticipated profits in the new location must be considered separate and apart from experience in a prior location. The business becomes a new business when the location is changed. (*Knier v. Azores Constr. Co.*, *supra*; see also *Alper v. Stillings*, 80 Nev. 84, 389 P. 2d 239 (1964)). In the instant case, Bardy's Societies may have had an established business in Paris with the operation of La Nouvelle Eve nightclub, but his Las Vegas sojourn was “an adventure” standing on its own experience. It was conceded to be an unknown business in the United States until the show opened in Las Vegas [Tr. 997, 1014]. Thus, any award based on loss of future profits, was erroneous and could only have been based on sheer speculation.

Since, as shown earlier herein, neither MCA nor Gerber was a party to any conspiracy against Bardy, the very most that MCA and Gerber could be liable for would be those damages, if any, proximately caused by some alleged breach of the MCA-Bardy agency agreement. If, in fact, MCA and Gerber breached their contract with Bardy, the only damage to which Bardy



would be entitled would be to recover the commissions paid to MCA on the extension contract, amounting to approximately \$6,000.00. Being purely an action for breach of contract, punitive damage would not be recoverable. (*Coca Cola Co. v. Dixie Cola Labs.*, 155 F. 2d 59 (Cir. 1946), *cert. den.*, 329 U.S. 773, 67 S. Ct. 192, 91 L. Ed. 665 (1946)).

**B. There Is No Basis in Law or in the Evidence to Support an Award of Damages to the Title "La Nouvelle Eve".**

Even if, with no factual support, it was to be found that Gerber and MCA were liable for the acts of other Appellants in their use of the title "La Nue Eve" from July 29 to October 21, 1959 for the Charles Henchis line of girls, there is still no substantial evidence of liability in such use and no substantial evidence to support an award of damages.

**1. The Damages Claim Based on the Allegation of Trade Name Infringement Under the Lanham Act Is Not Supported by the Evidence and Is Contrary to Law.**

In the trial of this action Bardy made an election to rely on the Lanham Act [15 U.S.C. §1121, 1126(b)(g)-(h); Clk. Tr. 1824] for his theory that one of the purposes and one of the actionable results of the alleged conspiracy was to cause public confusion and injury to the reputation of his alleged trade name, "La Nouvelle Eve" [Rep. Tr. 3119-3123, 3201-3202]. Did Bardy have a protectible "trade name" under the Lanham Act?

It is conceded that "La Nouvelle Eve", as allegedly used in commerce in the United States, was used solely as the title of the show Bardy brought to Las Vegas from Paris, where it was titled "Shocking." In Paris, "La Nouvelle Eve" was the name of a club owned by "Masart," a French corporation and leased to various societies [Rep. Tr. 1403-1404]. Further, the title "La



Nouvelle Eve" was not registered in the patent office of the United States and Bardy's claim for protection must therefore come within the provisions of 15 U.S.C. §1126(g) providing protection for "trade names or commercial names" *owned by persons whose country of origin is a party to a convention or treaty "without the obligation of filing or registration."*

While the Lanham Act relieves such foreign nationals of "the obligation" of registering trade names on the principal or supplemental register, the law presupposes that marks or names *are capable of registration* even though the obligation to register is waived. Was "La Nouvelle Eve" capable of registration under the Lanham Act? Was it a "trade name" within the meaning of this Act?

The answer is clearly that it was not capable of registration. Its only use by Bardy was as the title for the production staged in Las Vegas. The law uniformly holds that titles may not be registered and are not protectible under the Lanham Act as trade marks or trade names (*Application of Raymond K. Cooper*, 254 F. 2d 611 (C.C.P.A. 1958)). In the *Cooper* case, *supra*, an attempt was made to register under the Lanham Act "Teeny-Big", the title of a book. Affirming the Examiner's refusal to register the title the court held that a title cannot be a trade mark or a trade name because "however arbitrary, novel, or non-descriptive of the contents the name of a book—its title—may be, it nevertheless describes the book" (254 F. 2d at 615. See also *International Film Services Co. v. Associated Producers*, 273 Fed. 585 (S.D. N.Y. 1921); *Downes v. Culbertson*, 275 N.Y. Supp. 233 (1934)).

Since the title "La Nouvelle Eve" could not qualify as a "trade name" under the Lanham Act and would be protectible, if at all, only under the Nevada State law of unfair competition and, since Bardy elected to proceed under the Lanham Act and to waive State law pro-

tection, there could not have been any *legal injury* to any legally protected interest in the title "La Nouvelle Eve." Clearly there can be no conspiracy to do injury to a *non-existent* right. At most Bardy had what has been referred to as a "naked" claim for unfair competition and it is clear that those portions of the Lanham Act relied on by Bardy provide no remedy for such a claim (*Shaffer v. Coty, Inc.*, 183 F. Supp. 662, 664 (S.D. Cal. 1960)); *Chamberlain v. Columbia Pictures Corp.*, 186 F. 2d 923, 9th Cir. 1951).

As is more fully developed in the brief of Appellants, Elranco, Inc., *et al.* herein, the title "La Nouvelle Eve" was never, in fact, used as a trade name by Bardy either in the United States or in France. This is, of course, an additional reason for there being no basis for a recovery of damages under the Lanham Act.

Even if Bardy had not elected to rely on the Lanham Act, and had, in a diversity situation, elected to rely on the Nevada law, the result would be no different. The Nevada laws' definition of and protection for trade names is such that, as pointed out in the brief of the other Appellants, Bardy's mere *title* would not qualify as a trade name. Protection, if any, therefore, under State law would have to be grounded in the state law of unfair competition. There are no comparable Nevada cases but it is clear that on the facts presented here, the state law of unfair competition could not be extended to give protection to and damages for an alleged injury to the title "La Nouvelle Eve."

Under the decisions of the United States Supreme Court in *Sears, Roebuck & Co. v. Stiffel* (376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 661 (1964)) and *Compco Corp. v. Daybrite Lighting, Inc.* (376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 669 (1964)), state laws of unfair competition are restricted to cases of *palming off* and *false labeling* under state statutes so providing (376 U.S. at 272. See also, *Cable Vision, Inc. v. KUTV*,

335 F. 2d 348, 350-351 (9th Cir. 1964), cert. den., 379 U.S. 989, 85 S. Ct. 700, 13 L. Ed. 2d 609 (1964)). As will be demonstrated in the following pages, Bardy did not prove any of the elements necessary for palming off or false labeling. Therefore, whether under Federal or State law, Bardy's claim for damages to a trade name must fail.\*

2. "La Nouvelle Eve" Had No Secondary Meaning in the Market, Was Not Infringed by "La Nue Eve", and There Was No Proof of Actual Damage to Bardy Proximately Caused by the Use of the Title "La Nue Eve" From July 29 to October 21, 1959.

Even if the law of trade names under either state law or the Lanham Act were favorable to Bardy's theory, there are further reasons why he cannot prevail either on liability or on damages.

(a) *Lack of Substantial Similarity.*

First, there is not, as a matter of law, any substantial similarity between the title "La Nouvelle Eve" and "La Nue Eve". Without that there is no liability (Restatement of Torts §728). The phrases in their French spelling and pronunciation are different. In their translation they mean different things—The "New Eve" and The "Nude Eve." The manner in which they were advertised clearly shows that they were used for altogether different performances by different producers, in different settings, and at different times. As Plaintiff's

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\*The rule in the Ninth Circuit under *Stauffer v. Exley* (184 F. 2d 962 (9th Cir. 1950)), *Pagliero v. Wallace China Co.* (198 F. 2d 339 (9th Cir. 1952)) and the cases decided under that rule that there is a Federal law of unfair competition under Sections 44 and 45 of the Lanham Act, do not, it is submitted, change the elements of unfair competition or alter its essential substantive requirements. With the Supreme Court's declaration of Federal policy narrowing the scope of unfair competition in *Sears and Compco, supra*, to proof of palming off and/or false labeling with actual damages, these requirements for relief exist even under any such Federal law of unfair competition.





tion.” (*Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) (and numerous cases cited therein); *Harms Inc. v. Tops Music Enterprises, Inc.*, 160 F. Supp. 77, 82 (S.D. Cal. 1958); *Jollis v. Jacques*, 13 Fed. Cas. 910, 914 (1852) (establishing rule still followed that titles are not protected by copyright)). Since titles are not property and are not copyrightable, the only legal theory upon which Bardy can proceed is to prove a *palming off* by Appellants of their product or identified as that of Bardy after Bardy’s title has acquired a secondary meaning and to prove that as a proximate result thereof, Bardy has lost specific customers. (*Disney v. Souvaine Selective Pictures*, 98 F. Supp. 774 (S.D.N.Y. 1951), *aff’d.*, 192 F.2d 856 (2d Cir. 1951)).

(b) *Lack of Secondary Meaning.*

There was clearly not sufficient evidence to support the jury’s implied finding of a secondary meaning in the title “La Nouvelle Eve”. At best, plaintiff had used the title only in Las Vegas for a period of approximately ten weeks at the time of the alleged misappropriation of the title by defendants. The prior use of the same phrase as the name for a Paris night club by a French Corporation cannot serve to establish secondary meaning for Bardy in the United States. It was indeed conceded by Bardy that prior to opening in Las Vegas in January, 1958, “there was not what you might call a general professional reputation or general reputation among the American public of the title ‘La Nouvelle Eve’.” [Tr. 997-998]. And again “. . . La Nouvelle Eve had not been generally advertised or known to the general public . . ., even though it may have had a “professional reputation” among experts [Tr. 1014]. As the Supreme Court said in *Hanover Star Mill Co. v. Metcalf*, 240 U.S. 403, 416, 36 S. Ct. 357, 60 L. Ed. 713 (1915): “The mark of itself can-



not travel to markets where there is no article to wear the badge and no trades to offer the article.” And in the *Shoppers Fair* case, the court said: “The fact that a trademark or trade name may have acquired a secondary meaning in one locality does not mean it has such meaning in an entirely different trade area. . . .” (*Shoppers Fair of Ark., Inc. v. Sanders Co.*, 207 F. Supp. 718, 728 (W.D. Ark. 1962); see also *Fairway Food v. Fairway Mkt.*, 227 F. 2d 193 (9th Cir. 1955) *Weatherford v. Eytchison*, 90 Cal. App.2d 379 (1949)). Plaintiff’s title was at best a “weak” title, requiring a very strong showing to support secondary meaning. (*Collins v. Metro-Goldwyn-Mayer*, 25 F. Supp. 781, revd. 106 F. 2d 83 (2nd Cir. 1939)) (“Test Pilot”); *Curtis v. Twentieth Century-Fox Films, Inc.*, *supra.*; *Durante v. Paramount Pictures Corp.*, 111 N.Y.S. 2d 138 (1951) (“That’s My Boy”); *McGraw-Hill Book Co. v. Random House*, 225 N.Y.S. 2d 646 (N.Y. Sup. Ct. 1962) (“PT-109”); *Ball v. United Artists Corp.*, 214 N.Y.S. 2d 219 (1961) (“China Doll”)).

The only testimony given to support any secondary meaning in plaintiff’s title among the public was given by one or two so-called trade witnesses, experts in the field, who admittedly were not in the least confused [Tr. 87, 916]. Secondary meaning requires proof that a substantial segment of the population are aware of an association between the title and a particular producer and there was no such evidence in this case. (*Becker v. Loew’s, Inc.*, 133 F. 2d 889 (7th Cir. 1943), cert. den. 319 U.S. 772 (1943); *Manners v. Triangle Films Corp.*, 247 Fed. 301 (2d Cir. 1917); *Blich v. NBC*, 49 F. Supp. 346 (N.D. Ill. 1942); *Collins v. MGM*, *supra.*; *Curtis v. Twentieth Century-Fox*, *supra.*; *Whitman v. MGM*, 289 N.Y.S. 961 (1936); *Disney v. Souvaine Selective Pictures*, 98 F. Supp. 774 (S.D. N.Y. 1951), aff’d 192 F. 2d 856 (2d Cir. 1951)).

(c) *Failure of Proof of Damages.*

While Bardy failed to prove the two prerequisites for title or trade name protection, secondary meaning and confusing similarity, he further and fatally failed to prove actual damages. To recover damages for an alleged title or trade name infringement, it was incumbent upon Bardy to prove (1) actual damages to the title or (2) wrongful "profits" to Appellants. "Damages", as used in this connection, require a factual showing by Bardy that but for Appellants' use of a confusingly similar title, the public would have purchased Bardy's product or service, or that as a proximate result of the use of the title "La Nue Eve" the public attended believing that they were attending Bardy's show. In short, Bardy must prove actual lost customers. (*Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F. 2d 356 (7th Cir. 1965); *Laskowitz v. Marie Design, Inc.*, 119 F. Supp. 541 (S.D. Cal. 1954); *Fidelity Appraisal Co. v. Federal Appraisal Co.*, 217 Cal. 307 (1933)). There was no such evidence presented by Bardy in this case, other than the testimony of Lou Walters, producer of the Folies Bergere at the Tropicana Hotel in Las Vegas [Rep. Tr. 924], that he was "told" by other hotel operators in Las Vegas that because of the "confliction" of "La Nouvelle Eve" with "La Nue Eve", they were not interested in "La Nouvelle Eve" [Pltf. Ex. 384]. That evidence was conceded to be completely hearsay, was repeatedly objected to, and was admitted over objection by the Court "not to prove the truth of what Walters wrote the plaintiff", but "a report by an agent to his principal", which may not be true in the slightest. The District Court said: "*It cannot be received and considered as evidence of the truth, but only the evidence of what was reported to this plaintiff*" [Rep. Tr. 981]. (Emphasis added.) The Walters self-serving testimony introduced by Bardy in an at-

tempt to show damages contained its own seeds of destruction. In his testimony, Walters admitted that Bardy's "La Nouvelle Eve" was "in competition" with his shows; that he would not go out of his way to have it brought back to Las Vegas [Rep. Tr. 962, 973, 977], and that he "wasn't too anxious to see other places get an attraction which might interfere with the Tropicana's business" where Mr. Walters was producing the Folies Bergere [Rep. Tr. 977].

Thus (1) the Walters testimony was admitted solely to show his report to Bardy, (2) was not admissible evidence of, or admitted for the purpose of showing lost customers, and even if (1) and (2) were not present, was (3) the self-serving statement of a competitor of Bardy calculated to keep Bardy out of the Las Vegas market. It is particularly noteworthy that Bardy *did not subpoena on discovery or at the trial a single hotel operator or show purchaser in Las Vegas, Reno or elsewhere to testify on the issue of damages, despite the fact that they were within easy reach and limited in number. This was not the usual situation where customers widely dispersed, are unknown and plaintiff is handicapped in proving damages.* Nor was there a single witness called to testify that he attended a showing of "La Nue Eve" believing it to be Bardy's production. There was, therefore, absolutely no evidence of damages proximately caused by Appellants' alleged use of the title "La Nue Eve".

Nor did Bardy make any effort to prove that Appellants made a profit from the allegedly infringing use. Absent such a showing, evidence of which was easily available by subpoenaing the Hotel's records for the period in question, Bardy failed on that issue of proof and cannot claim that Appellants made his showing of (a) damages or (b) profits, impossible.

The fatal difficulty with Bardy's pleading and proof of damages is that it is based upon *equitable doc-*

*trines* fashioned by the courts in injunction proceedings *but not applicable in an action at law for damages*. Where the owner of a trade name that has acquired a secondary meaning brings an action *to enjoin in the future* another's adoption and use of a confusingly similar trade name or title, the courts have traditionally granted injunctive relief upon a showing that there is a "*likelihood of public confusion*." (*Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442 (S.D. Cal. 1945) *aff'd*, 158 F. 2d 798 (9th Cir. 1945), cert. den. 331 U.S. 824, 67 S. Ct. 1315, 91 L. Ed. 1840 (1945) (no proof of actual damages; injunction proper, but damages not recoverable). Where, however, the trade name owner sits on his rights, and permits "*likelihood*" of confusion to develop into what he claims is actual confusion causing *actual damages*, he must plead and prove *actual damages*, and not merely a *likelihood* of confusion, with a consequential loss of customers or wrongful profit to the infringer. (*Brooks Bros. v. Brooks Clothing of California*, *supra*; *Matzger v. Vinkow*, 174 F. 2d 581, 583-584 (9th Cir. 1927); *Sleeper Lounge Co. v. Bell Mfg. Co.*, 253 F. 2d 720, 723 (9th Cir. 1958); *National Van Lines v. Dean*, 237 F. 2d 688, 694 (9th Cir. 1956); *Tillman & Bendel v. California Packing Corp.*, 63 F. 2d 498, cert. den., 54 S. Ct. 55, 290 U.S. 678, 78 L. Ed. 554 (1933); *Ste. Pierre Smirnoff, Fls., Inc. v. Hirsch*, 109 F. Supp. 10 (S.D. Cal. 1952); *Ball v. United Artists*, 214 N.Y. 2d 219 (1961); *Chester Barrie, Ltd. v. Chester Laurie, Ltd.*, 189 F. Supp. 98 (S.D. N.Y. 1960)). On these issues, Bardy's proof fails totally and completely. There was *no evidence* of actual confusion, *no evidence* of lost customers, *no evidence* of profit to Appellants.

Having totally failed to meet the burden of proof on damages or profits as required, Bardy falls back upon a theory of "injury to the reputation" of the "La Nouvelle Eve" title. But again he tilts at windmills be-



cause there was again no evidence to support that claim. To prove injury to reputation, the first user of a trade name or title must establish (1) that the infringer's product is inferior, (2) that purchasers believing the product bearing the infringing name to be that of the first user, purchased it and found it to be inferior, and (3) as a proximate result of their experience, the purchasers thereafter refused to purchase the first user's product. (*Yale Electric Corp. v. Robertson*, 26 F. 2d 972 (2d Cir. 1928). See also, Brown, Advertising and The Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165 (1948)).

Bardy's evidence relative to the Henchis line of girls under the title "La Nue Eve" was merely that it was a "different" show; no evidence established that it was inferior, or that any patron received less nudity or entertainment than he paid for, or that as a result of viewing "La Nue Eve" any patron thereafter refused to patronize Bardy.

Even if, theoretically and without factual proof, the acts of El Ranco Hotel Operating Co., Katleman and Henchis in presenting the Henchis line of girls as "La Nue Eve" from July to October, 1959 with the Joe E. Lewis show were injurious to the reputation of the "La Nouvelle Eve" title, such injury would be an injury *to the business*. This is particularly true where, as here, Bardy specifically waived and disclaimed at the trial any claim to or right to recover damages for injury to his own *personal* reputation or to his own personal reputation in the night club business. Absent injury or even a *claim* of injury to his *personal or business reputation*, the case becomes one where the gravamen of the offense was a claim that the title "La Nouvelle Eve" was falsely associated with a different production. (See *e.g.*, *Carroll v. Warner Bros. Pictures*, 20 F. Supp. 405 (S.D. N.Y. 1937) (claim of injury to reputation of motion picture title is actionable as disparagement)). An essential ele-



ment in all such cases is proof of *special damages*. (*Eversharp, Inc. v. Pal Blade Co.*, 182 F. 2d 779 (2nd Cir. 1950), (applying same rule under §43 of the Lanham Act); (*Shaw Dry Cleaners & Dyers v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932); *Denny v. Northwestern Credit Assn.*, 55 Wash. 331, 104 Pac. 769 (1909); *Tower v. Crosby*, 214 App. Div. 392, 112 N.Y.S. 219 (1925). As Prosser says, "The plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived." (Prosser, *Law of Torts* (2d ed.) 766). The California courts recently adopted this rule over a plea that proof of general damages was sufficient. (*Erlich v. Etner*, 224 Cal. App. 2d 69, 73-76 (1964)). This rule is, of course, merely a particularization in a specific type of case of the general rule that damages cannot be remote, speculative or uncertain.

The damages rules requiring proof of loss of specific customers in cases of palming off and disparagement, by necessary result dispose of Bardy's argument that he need not produce such evidence because his inability to produce the evidence "was caused" by Appellants. Certainly any loss of specific customers would be as ascertainable by Bardy as anyone else, especially in a market of limited size like Las Vegas and he made no effort to prove "profits" to the Appellants.

**C. Bardy Was Not Deprived of His Performers or Other Elements of Production by Any Wrongful Act of Appellants and Proved No Damages.**

Bardy's claim that one of the purposes of the alleged conspiracy and one of the items of damage suffered was the depriving him of "his" performers and other production elements during the term of the extension contract and during the run of "La Nue Eve" are clearly not supported in the record.

This alleged deprivation was in two parts: first, during the period of the extension agreement—April 8 to June 2, 1959. The facts show that Bardy *consented* to the use of all of the elements of the “La Nouvelle Eve” production during that period [Rep. Tr. 2539, 292-293, 2543-2544]. The facts show that Bardy testified that he could put together another production of “La Nouvelle Eve” in Paris if the show was held over in Las Vegas and was not dependent upon the performers in Las Vegas [Pltf. Ex. 232, 234]. He was not, therefore, deprived and clearly not damaged. Even if there were a breach of the extension agreement by the Hotel for that period, a breach denied by the Hotel and certainly not participated in or precipitated by MCA or Gerber, the “damages” for “depriving” Bardy of his performers and the other elements of the production surely could not exceed the sum *he agreed*, on March 6, 1959 [Pltf. Ex. 492] was his price for the use of those items during the extension period. That sum was \$5,000 per week gross to Bardy [Pltf. Ex. 492]. There is no evidence to support any claim that had the show returned to Paris on April 8 and reopened there and run to June 2, 1959, Bardy would have made a sum equal to or in excess of \$5,000 per week. If there was a breach of the extension contract by the Hotel, Bardy’s maximum damages for all elements of “La Nouvelle Eve” would be precisely calculable and would total \$40,000 for breach of contract.

The second alleged deprivation occurred during the period from July 29 to October 21, 1959, when the Charles Henchis line of girls came to Las Vegas from Paris. Here Bardy’s claim is that he had a contract with Henchis to return to Bardy’s Paris club after the Las Vegas run [Pltf. Ex. 57, 473]. There is no dispute over the facts here. Henchis returned to Paris, offered himself for work, but Bardy’s club was closed and Bardy was incommunicado [Rep. Tr. 2039-2040, 2042,

2048]. Litigation ensued between Bardy and Henchis, the result of which the trial court erroneously excluded [Pltf. Ex. 336; Rep. Tr. 2087-2088]. The fact remains, that whatever the outcome, Henchis was free to return to Las Vegas with his line of girls on July 29, 1959 [Pltf. Ex. 334; Rep. Tr. 2051, 2700], and there is no evidence that Bardy undertook to mitigate his alleged damages by opening his club and replacing Henchis and his line of girls. Bardy's own testimony was that none of the troupe in Las Vegas was necessary for his continued operation either in Paris or elsewhere in the United States. Again it must be emphasized that whatever the relationship was between Bardy and the Hotel after June 2, 1959, MCA and Gerber were not parties to that relationship or to any of the acts done pursuant to it.

**D. The District Court Erred in Not Sustaining Appellants Objections to the Admissions of the Contracts and Records of the Stardust Hotel and the Tropicana Hotel for "The Lido" and "Folies Bergere" Productions.**

Over Appellants objections [Rep. Tr. 829, 836, 853-859] the District Court permitted the introduction of the contracts and records purporting to show the financial arrangements existing between the Tropicana Hotel for the "Folies Bergere" [Pltf. Exs. 532, 533] and the Stardust Hotel for the "Lido" show [Pltf. Ex. 571].

Although "similar business evidence," properly qualified, is admissible in certain cases on the issue of value, it is only admissible (1) when the value issue cannot be reasonably arrived at by the use of other more reliable evidence and (2) when, assuming the necessity for it under (1), there has been a proper foundation laid to show the precise similarity between plaintiff's property and the properties offered for comparison (*Los Angeles County v. Faus*, 48 Cal. 2d 672, 312 P. 2d 680

(1957); *Clark County School Dist.*, 87 Nev. 11, 348 P. 2d 164 (1960); *Allen v. Chicago & Northwestern R.R.*, 145 Wisc. 263, 129 N.W. 1094 (1911)).

The evidence here met none of the tests for admissibility set forth above. In addition, the court improperly admitted over objection, hearsay newspaper reports regarding what was paid for such shows [Pltf. Exs. 94, 170].

**1. There Was Sufficient Evidence on Damages Independent of the "Similar Business" Evidence; Such Evidence Was Unnecessary and Highly Prejudicial.**

Where, as here, Bardy was engaged in a new business venture in a new area, the best and only measure of damage caused to him by a loss of that business is *his* experience in that new market for the time he has been there (*Knier v. Azores Constr. Co.*, *supra*). All evidence other than Bardy's experience to date in the new market is prejudicial because it enables the jury to speculate on damages in a situation where speculation is not only unnecessary but also too attractive to the impassioned mind.

In this case, plaintiff introduced evidence of the value of his property in the particular market area, Las Vegas, and during the time that he had had experience in that market area. That evidence consisted of the original and the extension contracts between El Ranco Hotel Operating Co. and La Nouvelle Eve Corporation showing that the going price for the show was a gross \$15,000.00 per week for ten weeks, and a gross to Bardy of \$5,000.00 per week for eight weeks during the extension contract which Bardy refused to perform [Pltf. Exs. 90, 90a, 90b, 91 and 472]. Further, there was in evidence an exercised option agreement whereby the Hotel could return the show the following year *at the same price* [Pltf. Ex. 238]. It is clear that the evidence, without the so-called "similar business"



evidence, establishes that at best Bardy's damages could not exceed \$5,000.00 per week for eight weeks and even that figure is in dispute during the extension period when the only available buyer was not willing to pay Bardy a net of more than \$2,000.00 [Tr. 2653, *et seq.*]. The established contract price in the market is the best evidence of the value of Bardy's show and the existence of such direct evidence makes unnecessary and prejudicial admission, over Appellants' objections, of the "similar business" evidence.

2. **There Was No Sufficient Showing of Similarity Between "La Nouvelle Eve" and the "Lido" and "Folies Bergere" Shows.**

Over Appellants' objections, the District Court admitted into evidence the records and contracts of the Tropicana Hotel [Pltf. Exs. 94, 532, 533], the testimony of Lou Walters, producer at the Tropicana [Tr. 916], regarding the financial arrangements for the Folies Bergere show and the record of the Stardust Hotel [Pltf. Ex. 531] and the testimony of A. W. Orsene [Tr. 855, *et seq.*], custodian of the records, regarding the financial arrangements for the Lido show. In addition, the testimony of Marshall Rubin, comptroller of the Stardust [Tr. 825 *et seq.*] was received. All of this evidence was offered to show what other *alleged similar* Las Vegas nightclub shows received and to persuade the jury that such evidence would constitute a fair measure of the damage allegedly suffered by Bardy.

It is well established that such "similar business" evidence is admissible only where the businesses are *in fact*, similar (*Bagdasarian v. Gragnon*, 31 Cal. 2d 744 (1948); *Los Angeles County v. Faus*, 48 Cal. 2d 672 (1957)). The court pointed out in *Faus*, *supra*, that comparative evidence requires *careful safeguards*, including proof that the parcels of property were alike in *physical characteristics*, that other sales were *proximate*



*in time* and that evidence of these matters be *clearly established*.

A comparison between La Nouvelle Eve, on the one hand, and the Lido and Folies Vergere show on the other, demonstrates the following:

When Bardy came to Las Vegas in October 1958 and saw the Lido show, Bardy was very disturbed because he felt his show did not measure up to, could not be considered on a par with, or complete with the spectacular Lido show [Rep. Tr. 2356].

Louis-Guerin [Tr. 87 *et seq.*], general manager of the Lido Club in Paris, testified for plaintiff by deposition [Pltf. Ex. 447] that the La Nouvelle Eve Club in Paris (which, incidently, did not play the show in Paris under the title "La Nouvelle Eve"), ranked *fifth* among the production shows, the order of importance and prestige being (1) Folies Bergere, (2) Moulin Rouge, (3) Lido, (4) Casino de Paris and (5) La Nouvelle Eve [Tr. 97]. He further testified regarding these other shows that "they were all different." [Tr. 98-99].

While in artistic quality he thought the shows at the La Nouvelle Eve Club were "one of the best" [Rep. Tr. 99], such an opinion does not establish the required "similarity."

Plaintiff's witness, Lou Walters, producer of the Folies Bergere at the Tropicana, speaking of the shows at the La Nouvelle Eve Club in Paris, testified "it was no Folies Bergere—it was no Folies Bergere or Lido, but it was a good show." [Rep. Tr. 998].

In Las Vegas, the Lido, Folies Bergere and La Nouvelle Eve shows were entirely different. Again, the Lido and the Folies Bergere were regarded as the two most spectacular shows and the shows most people came to Las Vegas to see [Rep. Tr. 873]. As Marshall Rubin testified, the Lido was and is the most successful show in Las Vegas [Rep. Tr. 850]. Thus both in Paris and in Las Vegas there was admittedly a great disparity in

popularity and success, and consequently in value, between the show at La Nouvelle Eve Club, on the one hand, and the Lido and Folies Bergere on the other.

Approaching similarity from another angle, even greater disparity appears. Some of the factors testified to which affect this issue are: the setting in which the show is staged; the costumes; the choreography; the production techniques and the box-office capacity of the room in which shows are played. On these points, the evidence can be summarized as follows:

The Folies Bergere played the Tropicana Hotel; La Nouvelle Eve played the El Rancho Vegas Hotel; the Lido played the Stardust Hotel. A. W. Orsene of the Tropicana testified [Rep. Tr. 855, *et seq.*] that the consensus of opinion is that the Tropicana Hotel is the most beautiful in Las Vegas [Tr. 871], thus giving it a popular appeal over other hotels and making its budgets higher and the success of its shows more likely. Insofar as lighting, costumes and scenery are concerned, the court itself obtained from Bardy's counsel the concession that the Tropicana had "about the best money can buy." [Rep. Tr. 874]. The special engineering and lighting system alone there cost \$30,000 [Rep. Tr. 873]. The Tropicana showroom was built as a theater restaurant and is a theater in itself [Rep. Tr. 876]. The show room in the El Rancho Vegas Hotel "didn't have close vision . . . you had pillars and a very low seating" and the stage "was really a floor show", as distinguished from the Tropicana's lavish "theater" [Rep. Tr. 876]. The Tropicana seats 550 people for the dinner show and 650 for the late show [Tr. 878] with three shows on Saturday night. As the court pointed out, the seating capacity is important, since everyone is "in the business for money" [Rep. Tr. 879]. The costumes alone cost \$300,000 to \$350,000 per year [Rep. Tr. 870]. Bardy's costumes for "The Nouvelle Eve" cost \$4,000 [Pltf. Ex. 157].

Marshall Rubin of the Stardust testified for plaintiff [Tr. 725, *et seq.*] regarding the spectacular engineering features used in the production of the Lido show, including an ice rink, swimming pool, girls descending out of the ceiling, mirrors and other matters, the production cost of which runs as high as \$400,000 per year [Rep. Tr. 853-854]. Moreover, the Stardust is the largest hotel in Las Vegas in number of rooms [Rep. Tr. 851]. The Stardust Theater seats 1500 to 1600 people each night and on Saturday night 2300 to 2500 people [Rep. Tr. 850]. The Lido show is recognized in Las Vegas as the most successful show on the strip [Rep. Tr. 850-851].

With respect to the actual physical content of the La Nouvelle Eve show and the Lido show, a comparison of what was called for in the El Ranco-La Nouvelle Eve contract [Pltf. Ex. 90] and the Stardust-Lido contract set forth in the record [Rep. 847, *et seq.*] clearly proves the dissimilarity of the physical content of those two shows. The same result obtains by comparing Plaintiff's Exhibit 90 for the La Nouvelle Eve show with Plaintiff's Exhibit 531 for the Folies Bergere show. The La Nouvelle Eve show as it played Las Vegas was substantially the same show that played in La Nouvelle Eve Club in Paris under the name "Shocking." Having seen that show in Paris and being fully familiar with the Folies Bergere and Lido shows, Lou Walters testified for Bardy as follows:

"Q. Now, you referred in that testimony to the difference between Lido, Folies Bergere and La Nouvelle Eve shows. Would you explain what you meant by the difference between the type of revenues presented by those respective night clubs or theaters? A. Well, the Folies Bergere is a theater. In the Folies Bergere there is something like 75 to maybe 100 people. They use a great deal of scenery, and a great deal of the effect on the

audience from the show presented at the Folies Bergere comes from the scenery effects. The director of the Folies Bergere is somewhat of a genius when it comes to scenery. \* \* \* Where the Nouvelle Eve had a line of perhaps 12 or 16 dancing girls, and perhaps a dozen show girls, the Folies Bergere would have dozens. Have two or three different groups of dancers used in their production numbers. A great many more production people. \* \* \* They would also have 12 — what they call over there mannequins, which are the nude girls. And they would in addition have a dozen show girls who were not nudes but neither were they dancers, they were show girls. The Folies Bergere seats perhaps 1500 people. The La Nouvelle Eve seats probably from two to three hundred people—two hundred fifty to three hundred people. The La Nouvelle Eve show would run an hour and a quarter for the first part and maybe an hour for the second part. The Folies would open at eight thirty and run continuously, except for a fifteen-minute intermission, until 12 o'clock. Three hours or more. The Lido gets a great deal of its impact from the use of what we call props, or you might call devices. A skating rink that comes out, or a waterfall—other props. La Nouvelle Eve, because of the small size of the stage, would use practically no props—at least I can't remember any. Their scenery would be confined to two, three, four or five back curtains in the extreme rear of the stage without its being placed on any part of the actual dancing stage."

He further testified that in French money the Lido show would cost roughly twice as much as La Nouvelle Eve [Rep. Tr. 1005]. In revenues, the Lido derives much more, or as Mr. Walter put it, "Oh, tremendous difference. The Lido has got three times as many



people. Has a far bigger business.” [Rep. Tr. 1007]. The La Nouvelle Eve’s revenue would be “perhaps a third.” [Rep. Tr. 1007].

From every conceivable angle, there is no showing of any similarity between La Nouvelle Eve and the Folies Bergere and The Lido shows. Bardy’s myopic comparison simply overlooks the facts of dissimilarity and comes down to a reliance upon the fallacy that because apples and oranges are both round and are classified as fruit, they are the same. Because La Nouvelle Eve, on the one hand, and the Folies Bergere and The Lido shows on the other all originated in Paris, and all staged production numbers Bardy attempted to persuade the jury that a French show is a French show without distinctions. If one is worth a million dollars, they all are. That this is erroneous has already been demonstrated above and the failure of the District Court to reject this evidence and testimony was clearly prejudicial error.\*

The alleged “similar business” evidence erroneously permitted the jury to have before it evidence of the tremendous amount of money paid by the Tropicana and Stardust for wholly incomparable, superior, more successful shows played in wholly dissimilar and much larger Hotels, in determining the damage, if any, suffered by Bardy from the alleged acts of the Appellants regarding La Nouvelle Eve.

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\*Other of Bardy’s own witnesses testified to the utter dissimilarity of the three shows. Lou Walters, for example, producer of the Folies Bergere at the Tropicana, testified:

“Q. What are the standards by which you evaluate the pattern or quality of that particular type of show? A. I can’t define it. The ‘Nouvelle Eve’ was a good show. I made no effort to compare it with what anybody else does. And ‘Nouvelle Eve’ has its own appearance. It is a particular kind of show, the same as the Lido is a particular kind of show. You can tell a Lido show. You can tell a Folies Bergere show. \* \* \*” [Rep. Tr. 929-930].



**E. The Punitive Damages Award Were Unsupported by the Evidence and Excessive in Amount Against Both MCA and Gerber.**

Both with respect to MCA and to Gerber, there was absolutely no evidence that either acted in their relationships with Bardy with the necessary *malice* to support an award for punitive damages. The previous review of the evidence demonstrates beyond question that defendants acted at all times in the good faith belief that they were representing their client to the best of their ability and for his best interest. Further, the review of the evidence made herein establishes that Bardy suffered no actual damages and the court properly instructed the jury that there could be no recovery of punitive damages absent proof of actual damages [Tr. 3102]. Alternatively, if the evidence establishes proof of any compensable damage to Bardy, the amount of such actual damage cannot, as far as MCA and Gerber are concerned, exceed approximately \$46,000.00, all on a breach of contract theory wherein punitive damages are not allowed. The award of \$225,000.00 in punitive damages by the jury is not supported by any showing of tortious conduct or malice, and even if those were proved, the amount awarded would be manifestly excessive. The purpose of punitive damages is not to destroy. (*Miller v. Schnitzer*, 371 P. 2d 824 (Nev. 1960); *Rocky Mountain Produce Trucking Co. v. Johnson*, 369 P. 2d 198 (Nev. 1962); *Mother Cobbs Chicken Turnovers v. Fox*, 10 Cal. 2d 203 (1937)).

**1. The Award of Any Punitive Damages Against MCA Artists, Ltd. Is Contrary to Law.**

In its instructions to the jury, the District Court told the jury that an award of punitive damages may be made only for “wanton, malicious or oppressive” conduct by a defendant [Tr. 3105]. Further, the court

told the jury that a corporation like MCA Artists, Ltd. could be held for punitive damages for the malicious acts of its agent or employee only "if the corporation previously authorized or subsequently ratified the conduct." [Tr. 3105]. With reference to this record, the court instructed the jury that *there was no evidence of any prior authorization* to MCA's agents to do an unlawful act, "so the question is, under the circumstances, was there subsequent ratification of it by the corporation, *with knowledge* of what the agent had done?" [Tr. 3194].

The only theory of ratification put forth by Bardy and relied upon by the court in its instructions [Tr. 3105] was that failure to discharge an employee known to have committed a wrongful act permitted the jury to draw an inference of ratification. A verdict based on such an instruction is both contrary to law and, in this instance, not supported by the evidence.

The applicable Nevada law on the issue of ratification by retention in employment is clearly set out in *J. C. Penney Co. v. Gravelle*, 62 Nev. 434, 155 P. 2d 447 (1945). There a clerk ran out of the store after a thief. The thief dropped the merchandise in the street and while the employee was in pursuit, plaintiff started interfering with the employee. The employee picked up the merchandise and started walking back to the store, all the while arguing with plaintiff. Finally they got into a fight and plaintiff was badly hurt. In an action against the store for assault and battery, the court held that the tort was not authorized and that failure to discharge the employee with knowledge of the tort *was not sufficient evidence of ratification*. Moreover, even the fact that in addition to failing to discharge the employee, he was given an increase in salary did not make out ratification. Recent rulings by the Nevada courts are in accord with the general law of agency

as expressed in the Restatement of Agency, 2d, §94, comments d and 217c. According to the Restatement, regardless of whether the tort was committed in the scope of employment, there can be no ratification merely upon a showing that the employer, even with knowledge of the tort, failed to discharge the employee. Recent California cases are in accord. In *Sullivan v. Matt*, 130 Cal. App. 2d 134 (1955), the defendant retained and promoted an employee after he had assaulted another in the scope of his employment. The court held that the defendant did not thereby ratify the tort.

The older Nevada cases of *Forrester v. So. Pacific Co.*, 36 Nev. 247 (1913), and *Burrus v. N.-C.-O.-Ry.*, 38 Nev. 156 (1914), appearing to permit a finding of ratification by retention in employment, are either impliedly overruled by the *J. C. Penney* case, *supra*, or to be distinguished as cases involving public utilities and strict liability.

**F. There Was No Breach by MCA or Gerber of the Artist's Agency Contract nor Any Proof of Damages Proximately Caused by Any Such Alleged Breach.**

Under the express terms of the agency contract [Pltf. Ex. 73] MCA became Bardy's agent and agreed to "occupy itself diligently without, however, guaranteeing the success of its endeavors." [Pltf. Ex. 73]. Bardy, under the contract, reserved to himself the right to refuse to accept "business proposals" submitted to him by MCA. (*Ibid.*) That contract began on August 1, 1958 and continued until terminated by Bardy on or before May 6, 1959 when he brought suit against MCA in Paris to annul the agreement. Although constantly attempting to go behind and to undermine the fact, *Bardy stipulated at the trial that MCA and Gerber fully performed all of their duties under that contract*

*until on or about* April 1, 1959. Bardy's theory appears to be that on or about that date, Appellant Gerber breached the agency agreement by allegedly failing to communicate with Bardy in Paris from April 1 to April 8, 1959, by accepting on behalf of Bardy, as he was instructed to do, a modified version of the extension contract, by failing to return the troupe to Paris on April 10, 1959, despite the fact that Gerber had no such instruction from Bardy and by knowledge that the Henchis line of girls played at the El Rancho Vegas Hotel from July 29 to October 21, 1959 (over which he had no control).

Does the law or the evidence support a finding that MCA or Gerber failed to perform the duties required of them under the agency contract?

By contract they were required to occupy themselves "diligently" with Bardy's affairs; they did not guarantee their success and Bardy had the right to refuse any offer transmitted to him by MCA or Gerber [Pltf. Ex. 73]. "Diligently" in this context means simply that an agent will use reasonable care, defined as that standard of care and skill which is the standard "in the locality for the kind of work which the [agent] is employed to perform." (Restatement, Agency 2d §379; *Baltimore Baseball Club & E. Co. v. Pickett*, 78 Md. 375, 28 Atl. 279; *Scott v. Security Title Ins. Co.*, 9 Cal. 2d 606, 72 P. 2d 143 (1937)) Further, an agent is under a duty "to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him" (Restatement, Agency 2d §381), *unless* the principal is already aware of the facts. (*Ibid.*, Illustration 1) Also of importance here is the general rule that an agent is subject to a duty to the principal to follow the *expressed* instructions of the principal. (Restatement, Agency 2d §383). This latter duty is qualified to the extent that where the instructions



from the principal are ambiguous or absent, the agent is not liable for conduct in accordance with a reasonable but erroneous interpretation of those instructions (*Moore v. Coler*, 99 N.Y.S. 46, aff'd., 195 N.Y. 507, 88 N.E. 1126 (1909)), or for conduct which the principal has advised against where there has been a substantial change in conditions requiring quick action. (Restatement, Agency §383, Comment a); (See also, *Isenberg v. Sherman*, 212 Cal. 454, 298 Pac. 1004, 299 Pac. 528 (1931)). By the same token, *a principal is under a duty to communicate to the agent* information which is relevant to the affairs the agent is charged with performing. (*Walter v. Libby*, 72 Cal. App. 2d 138, 164 P. 2d 21 (1946)). If an agent reasonably and in good faith misapprehends or acts contrary to the principal's instructions, the principal, when apprised of that fact, "has a duty" to act himself to correct any error. As the court said in *Towles v. Norbest Turkey Growers Assn.*, 275 F. 2d 196, 201-202 (9th Cir. 1960) regarding the principal's duty when he knows an agent has erred,

"He may not sit idly by and later make known his secret thoughts in an effort to cast an ensuing loss on an agent who has acted in the light of what he had been allowed to reasonably believe he may do."

(See also, 1 Mecham on Agency 333 (2d ed.1914); *Lawrence Warehouse Co. v. Twokig*, 224 F. 2d 493 (8th Cir. 1955)).

Where a principal relying not on the acts or advice of one agent, but on the advice of others, acts in such a manner that he suffers an injury, the agent upon whom he did not rely is not liable for the damage (*Barnes v. Dobbins*, 159 Cal. App. 2d 737, 324 P. 2d 696 (1958); *Matheny v. Farley*, 66 S.E. (W.Va.



1910)), and even where an agent disobeys instructions, he is not liable if in fact the same result would have obtained if he had obeyed the principal's instructions. (*Goddard v. Metropolitan Trust Co. of California*, 82 F. 2d 902 (9th Cir. 1926); *Shrewsbury v. Dupont National Bank*, 10 F. 2d 632 (D.C. 1926)).

These rules of general applicability of the law of agency completely absolve MCA and Gerber of any charge that they breached their agency contract with Bardy. Further, if there was a breach, they are absolved of any charge that such breach proximately caused injury to Bardy. The facts as reviewed heretofore establish beyond question that Gerber performed his duty to communicate Katleman's position of April 1, 1959 to Bardy (a position already known to Bardy); that Gerber used diligence at all times on Bardy's behalf with Katleman, AGVA and the uncooperative cast members; that Gerber sought and received the rulings of AGVA, which by contract and custom had the responsibility for determining such disputes; that Bardy appointed and relied upon the information and advice from agents other than Gerber, viz., Holmes, Durieux and the attorney, Brody, in his actions; that Bardy failed to communicate instructions to Gerber after March 30, 1959 and that Gerber reasonably believed that the actions taken by him were in accordance with Bardy's wishes as Gerber, in good faith, understood them at the time from Bardy's representatives and in a situation of emergency and changed conditions. That Gerber may have been erroneous, may have used poor judgment, may have disappointed Bardy, may have taken a course that would not have been taken by Stein, or may have believed Katleman was justified in his actions—none of those would constitute a breach of the agency contract or make Gerber or MCA liable for such a breach.

There are other reasons why plaintiff is not entitled to the damages awarded. The court properly instructed the jury that Bardy had a duty to mitigate any damages suffered by him. This is in accord with both contract and agency law. (Restatement, Agency 2d §415; *Connors v. Old Forge Discount & Deposit Bank*, 245 Pa. 97, 91 Atl. 210 (1914)). A principal may also be barred from recovery of damages where his own contributory negligence brings about those damages. (*Ibid.*); (see also, *Schustrin v. Globe Indemnity Co.*, 44 N.J. 462, 130 A. 2d 897, 899 (1957); *Fort Valley Coca-Cola Bottling Co. v. Lumberman's Mut. Cas. Co.*, 69 Ga. 120, 24 S.E. 2d 846, 851 (1943)). The facts in this case establish beyond question that any damages suffered by Bardy were the result of his own failure to act in the face of full knowledge of all of the material facts in connection with Katleman's handling of the dispute over the extension agreement. Bardy equivocated; he first accepted, then claimed not to have accepted; he failed to return the troupe to Paris; he failed to advise MCA or Gerber of his decisions; and he placed the entire matter in the hands of representatives and lawyers having no connection with MCA or Gerber. When he had full knowledge of the events of April 8, 1959, he took no action to mitigate his damages nor did he do so when he learned of the Katleman-Gregory-Henchis contract to bring the Henchis line of girls to Las Vegas in July of 1959. His damages, if any, were, therefore of his own making and were not proximately caused by any act of the defendants MCA or Gerber. (See *Goddard v. Metropolitan Trust Co. of California*, 82 F. 2d 902 (9th Cir. 1936)). Again it must be emphasized that a breach of the agency contract, even if proved, would not permit an award of punitive damages.

IX.

APPELLANTS DID NOT RECEIVE  
A FAIR TRIAL.

A. It Was Prejudicial Error for the Court on Its Own Motion to Transfer the Place of Trial From Las Vegas, Nevada, Where the Facts Occurred, Where the Case Was Filed, and Where a Majority of the Defendants and Witnesses Resided, to Carson City, Nevada.

Appellants submit that the transfer of this case by the court on its own motion from Las Vegas, Nevada to Carson City, Nevada, was prejudicial error.\* Such transfer does violence to the spirit of 28 U.S.C. §1404, Rule 3, of the United States District Court for Nevada Rules and to the right of the defendants to a fair trial under the Seventh and Fourteenth Amendments to the United States Constitution. While under normal circumstances it may well be within the discretion of the court to fix the time and place of trial, the action of the court in the circumstances of this case clearly constitutes an abuse of discretion.

Under Rule 3, transfer of the case from the place where the action is filed may only be had “for good cause.” No such showing was made in this case. Moreover, the “good cause” requirement normally pertains to the convenience of witnesses and parties (see 28 U.S.C. 1404(a)), and there is nothing in Rule 3 of the Local Rules to indicate any different meaning. Here, all the convenience factors, all the interest of justice factors, and ordinary common sense dictate that the place of

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\*It should be pointed out that this case was originally assigned to Judge John R. Ross. By purporting to employ a relative of Judge Ross, counsel for Appellee Bardy procured Judge Ross’ disqualification from the case, thus setting in motion the chain of events leading to the transfer of the case to Carson City [Clk. Tr. 31, 55].

trial should have been, and as a matter of law, had to be, Las Vegas. Not a single witness in the case was from Carson City; no records were there; all of the previous and voluminous proceedings in the case were in Las Vegas. A heavy burden was put upon all of the appellants to move the trial, the witnesses and the records the approximately 400 miles to Carson City.

Since 28 U.S.C. §108 provides that the United States District Court shall sit in Carson City, Elko, Reno and Las Vegas, there is an implied adoption of "divisions" of said court and under 28 U.S.C. 1404(b) a transfer from one division to another may only be made upon motion of the parties. (Cf. *McNeil Construction Co. v. Livingston State Bank*, 155 F. Supp. 658 (D. Mont. 1957) (rev'd on other grounds); *Walsh and Wells v. City of Memphis*, 32 F. Supp. 448 (W.D. Tenn. 1940). No such motion was made by any party.

#### **B. Appellants Were Denied Their Right to a Fair and Impartial Trial by Jury.**

Under the Seventh and Fourteenth Amendments, the appellants were denied their right to a fair trial by an impartial jury. Certainly it is implicit in the concept of jury trial that the jury be drawn from the group of eligible citizens best able to evaluate the conduct of the defendants in their particular environment. (See, *e.g.*, *Utsey v. Charleston*, 38 S.C. 399, 17 S.E. 141 (1893)). One factor to be taken into account in determining the fairness and impartiality of a jury is the proximity in area, environment and experience which the jurors have to the parties to the litigation. (*United States v. Standard Oil Co.*, 170 Fed. 988 (D. Ill. 1909); *Rios v. Lacey Trucking Co.*, 123 Cal. App. 2d 865 (1954).)

It is a widely known fact that the northern and southern sections of the State of Nevada in which Carson City and Las Vegas are located differ markedly in popu-



lation, custom and economic structure. It is also well known in Nevada that there is a substantial segment of the population in the northern section which holds a strong bias against Las Vegas and particularly against the so-called "Las Vegas Strip" hotels. This bias against Appellants identified with Las Vegas is too obvious to be denied.

The jury deliberated in this case for a total time of three hours and forty-five minutes after a trial lasting from August 5, 1963 through August 23, 1963, a total of eighteen elapsed days during which literally reams of complicated documents and contracts were submitted, requiring careful analysis, the testimony of twenty-three witnesses was heard covering over 3,000 pages of transcript, and a set of instructions covering 96 pages of transcript was read. From all that mass, the jury was called upon to determine which, if any, of some 34 individuals named as participants in a conspiracy against Bardy [Tr. 1592-94] did, in fact, do so; which if any, of the seven appellants actually sued on the conspiracy were members of one, and which, if any, of five independent wrongful acts, including breaches of complex contracts, infringement of trade name, injury to reputations and depriving plaintiff of his employees, were committed pursuant to the conspiracy and by whom. Yet in a span of three hours and forty-five minutes the jury in this case resolved all those issues and awarded the unconscionable sum of \$476,200.00 to plaintiff on the conspiracy count and \$27,000.00 on another and separate contract count. Such haste clearly violated defendants' right to a fair trial by an impartial jury. (*Turner v. Cotham*, 105 N.W. 2d 237 Mich. 1960); *Kenan v. Moore*, 195 So. 167 (Fla. 1940)).

Under 28 U.S.C. § 1865(a) jurors to be selected "so as to be most favorable to an impartial trial. . . ." The Supreme Court pointed out in *Thiel v. Southern Pac.*



*Co.*, 328 U.S. 217 (1946) that the “American tradition contemplates an impartial, cross-sectional jury” and a jury which excludes, without any showing of any balancing need for it, all those persons most apt to represent a cross-sectional jury, results in a denial of a fair trial. The transfer of this case to Carson City from Las Vegas had precisely that affect and the transfer was unlawful.

When to all of this is added the District Court’s requiring of Saturday sessions and night sessions, its pressures on counsel cut short presentation of evidence, and to present closing argument without a fair opportunity to settle on and know the Court’s proposed instructions to the jury, the denial of a fair trial is manifest.

### Conclusion.

On each and all of the foregoing grounds and upon each further ground presented in the Brief of Co-Appellants, the verdict and judgment below should be reversed.

Respectfully submitted,

ROSENFELD, MEYER &  
SUSMAN,

By ALLEN E. SUSMAN,  
VICTOR S. NETTERVILLE,

FOLEY BROS.,

By JOSEPH E. FOLEY,

*Attorneys for Appellants, MCA Artists,  
Ltd. and Roy Gerber.*

### **Certificate.**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.\*

ALLEN E. SUSMAN.

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\*The number of pages in excess of those permitted by the rules is pursuant to an Application and Order of the Court approving the increase.









## APPENDIX A.

### Plaintiff's Exhibits

<u>No.</u>	<u>Identified At Page No.*</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected**</u>
13				
14		71	74	
16		1014	1014	
18		1014	1015	
20		1015	1015	
21		74	75	
22		1015	1015	
26		1372	1372	
28		1015	1016	
29		1016	1016	
30		1653	1653	
32		1016	1016	
44		1104	1104	
45		1017	1017	
47		75	75	
52		75	75	
56		178	179	
62		1017	1017	
57		1032	1032	
66		1017	1018	
68		1652	1652	
70		75	76	
72		76	76	
73		100	102	
75		106	107	

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\*Many of the exhibits were not identified, and were marked prior to trial and court sessions.

\*\*Only admitted exhibits are part of the record.

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
75 A 1 through 75 A 18		181	181	
76		108	109	
82		109	109	
83		109	110	
86		110	110	
86 A		110	112	
87		112	113	
88		1644	1645	
89		113	113	
90		125	125	
90 A		1260	1261	
90 B		1262	1262	
91		1031	1031	
93		1165	1165	
94		76	77	
95		126	126	
96		879	879	
97		138	139	
98		126	126	
105		703	706	
100		1969	1971	
101		1969	1971	
102		1969	1971	
109		177	178	
129		989	919	
141 A		494	495	
141 B		494	495	
141 C		494	495	
150		184	184	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
151		187	187	
152		2701	2702	
153		187	188	
156		1167	1168	
157			1845	
159		188	188	
162		188	189	
164		189	189	
165		189	189	
166		190	190	
167		190	190	
170		196	198	
179		1858	1858	
183		1293	1294	
185		1281	1283	
186		1368	1370	
191		1368	1370	
193		1368	1370	
196		1368	1370	
198		1373	1373	
200		1314	1315	
201		1314	1315	
205		1368	1370	
207		1368	1370	
209			1206	
211			1206	
212			1206	
213			1206	
214			1206	
215		507	507	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
216			1206	
217			1206	
219		1196	1197	
220			1206	
222		375	375	
225		382	383	
226		383	383	
229			1206	
231			1206	
232			1206	
234			1206	
235			1206	
238		385	385	
239		383	384	
240		384	384	
242			1206	
243		440	440	
244			1206	
247		1222	1222	
250		394	395	
251		394	395	
252		394	395	
253		394	395	
254		394	396	
255		394	396	
256		394	396	
260			1206	
261		394	396	
262		394	396	
264		438	438	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
265			1206	
269			1206	
270		441	441	
271		441	441	
272			1206	
273			1206	
275		910	911	
282		457	458	
284			1206	
292		1368	1370	
294		739	740	
295		1368	1370	
298		1231	1232	
304		1370	1370	
305		1231	1232	
306			1548	
309		1371	1371	
324		532	533	
326		1370	1370	
327		1370	1370	
333		532	533	
334		548	549	
335		555	555	
335 A		545	546	
336		1372	1372	
342		532	533	
343		1327	1328	
347 A		544	545	
364		2699	2700	
368 A		546	547	
378		1373	1373	



<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
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406		767	767	
415		1646	1647	
419		1646	1648	
421		1646	1647	
426		1646	1647	
438		1646	1647	
439		1646	1647	
447	83			
448		128	128	
449		128	129	
450		129	129	
451		130	130	
452		130	130	
453		130	131	
454		131	131	
455		131	132	
456		132	132	
457		133	133	
458		133	134	
459		134	134	
460		134	135	
461		135	135	
462		135	136	
463		136	136	
464		136	136	
465		136	137	
466		138	138	
467	211			

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
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469		235	236	
470		236	236	
471		236	237	
472		238	238	
472 A		1263	1264	
473		238	238	
474		357	358	
475		358	358	
476		365	366	
477		375	376	
478		389	389	
479	392			
480	379			
481 A	412			
481 B	412			
481 C	409			
482		438	438	
483		443	444	
484		444	445	
485	460			
486	464			
487		488	489	
488		508	510	
489		605	606	
490		609	610	
491		611	611	
492		611	612	
493		612	612	
494		612	613	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
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496		613	613	
497		613	614	
498		614	614	
499		614	615	
500		615	615	
501		614	615	
502	620			
503	634			
504		670	671	
505		675	676	
506		685	686	
507		686	686	
508		686	686	
509		687	687	
510		687	687	
511		720	720	
512		511	512	
513	728			
514	728	738	738	
515	729	738	738	
516	730	738	738	
517	730	738	738	
518	730	738	738	
519	731	738	738	
520	731	738	738	
521	732	738	738	
522	732	738	738	
523	732	738	738	
524	732	738	738	
525	732	738	738	

<u>No.</u>	<u>Identified At Page No.</u>	<u>At Page No. Offered</u>	<u>Received At Page No.</u>	<u>Rejected</u>
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527	733	738	738	
528	733	738	738	
529	735	738	738	
530	735	738	738	
531	828	829	830	
532	857	859	859	
533	857	859	859	
534	887			
535	916			
536	1020			
537	1020			
538	1021			
539	1021			
540	1033			
541	1035			
542	1049			
543	1131			
544	1177	1178	1182	
545	1178	1178	1182	
546	1432			
547		1654	1655	
548		1814	1815	
549	1850			
550	2163			
551	2338			
552	2416			
553 A	2583			
553 B	2583			
553 C	2583			

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
554	2609			
555		2615	2616	
556		2642	2642	
557		2675	2675	
558	2682			
559		2708	2708	
560		2708	2708	
561		2718	2719	

### Defendant Hotel's Exhibits

A	1447	1448
B	1458	1458
C	1470	1470
D	1500	1500
H	1536	1537
I	1584	1585
J	1990	1995
K	2342	2342
M	1875	1876
M-1	1878	1878
N	1901	1902
P	2567	2567
Q	2572	2572

### Defendant MCA's Exhibits

DR	2399	2399
DW	2402	2402
EJ	327	328
EL	2404	2404
LC	1596	1596



<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
LW		703	706	
MP		2401	2401	
MQ		2401	2401	
MR		2402	2402	
MS		2404	2404	
MT		2403	2403	
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## APPENDIX B.

### Specification of Errors Relied Upon.

1. The conspiracy verdict and judgment are not supported by the evidence and are contrary to law.
2. The conspiracy verdict against the corporate defendants MCA ARTISTS, LTD. is not supported by the evidence and is contrary to law.
3. The damages awarded are excessive, against the weight of the evidence and contrary to law.
4. The Court erred in the admission, over objection, of so-called "similar business" evidence on damages.
5. The punitive damages award was not supported by the evidence, was contrary to law and was excessive.
6. The Court erred in its instruction to the jury on the burden of proof in conspiracy.
7. The Court erred in submitting the issues to the jury in improper order.
8. The Court erred in refusing to hold that plaintiff's action was barred by the Nevada Fictitious Name statute (Ch. 602, Nevada Revised Statutes).
9. The Court erred in refusing to submit to the jury the issue of whether plaintiff's action was barred by the Nevada Fictitious Name statute (Ch. 602, Nevada Revised Statutes).
10. The Court erred in refusing to hold that plaintiff's action was required to be submitted to arbitration, in whole or in part.
11. The Court erred in refusing to hold that plaintiff was not the real or proper party in interest.
12. The Court erred in refusing to hold that plaintiff was estopped to bring this action.

13. The Court erred in refusing to submit to the jury the issue of whether plaintiff was estopped to deny the corporate existence of La Nouvelle Eve Corporation.

14. The defendants did not receive a fair trial and were deprived of their constitutional and statutory rights to a fair trial.

15. The Court erred in denying defendants' motion to transfer the trial to Las Vegas, Nevada.

16. The Court erred in refusing to instruct on the "two-conspiracies" rule and the verdict and judgment are inconsistent with the rule.

17. The Court erred in refusing to instruct on the "two-issues" rule and the verdict and judgment are inconsistent with the rule.

18. The evidence did not support a finding of any knowledge of, participation in, or ratification of any conspiracy by MCA ARTISTS, LTD.

19. The evidence did not support a finding of any knowledge of, participation in, or ratification of any conspiracy by ROY GERBER.

20. The evidence did not support a finding of any knowledge of, participation in, or ratification of any conspiracy by BELDON R. KATLEMAN.

21. It was error to find that any wrongful acts by any employee or agent of MCA ARTISTS, LTD. was within the scope of the employment of any such employee or agent.

22. The evidence does not support a finding of any legal injury to any personal or property right of plaintiff.

23. There was no breach by MCA ARTISTS, LTD. or by ROY GERBER of the Artists' Agency Con-

tract nor any proof of damages proximately caused by any such alleged breach.

24. It was error to permit the jury to consider alleged lost profits in determining damages.

25. The Court erred in instructing the jury on the issue of trade name infringement under the Lanham Act and as to damages thereunder.

26. Since plaintiff proved neither patent nor copyright infringement, the Court erred in permitting unfair competition theories to be presented to the jury to establish damages pursuant to the alleged conspiracy.

27. The District Judge erred in favorably commenting upon plaintiff's case in the presence of the jury.

28. The verdict was the result of confusion, passion and prejudice.

29. Plaintiff's counsel was guilty of prejudicial misconduct throughout the trial.

30. The award of damages was based on remote and speculative evidence.

31. The Court erred in admitting, over objection, certain assignments to plaintiff.

32. The conspiracy verdict and judgment are internally inconsistent.

33. There exists no basis for the award of damages under the contract of December 1, 1958.

34. The Court erred in denying defendants' motions for a directed verdict.

35. The Court erred in denying defendants' motions for judgment notwithstanding the verdict or, alternatively, for a new trial.

## APPENDIX C.

### Direct Testimony of Roy Gerber Regarding April 8, 1959.

“By Mr. Foley; Q. Tell us, now, Mr. Gerber, What occurred on April 8th. A. It wasn't too much longer after that that a great deal of noise came through the backstage area, which is right adjacent to the restaurant. When I got back there there was a security guard from the El Rancho, a town marshal, a man who was later introduced to me as a lawyer, the cast, Peter Holmes. There seemed to be a lot of confusion, a lot of yelling, a lot of screaming. I asked Peter Holmes what the difficulty was, and he said that the policeman would not let the troupe get on the stage, claiming that the troupe was not there as per the contract. I asked the officer if that was so, and he said yes. I asked Peter if the entire troupe was there, as per the contract. He said no, they weren't. He told me that Aleta was not there, nor was Janine Caire there. I went to see Mr. Katleman—

Q. Did you have any conversations at the point with Peter Holmes? A. Oh, yes.

Q. Will you state what that conversation was? A. Something—we discussed the conversations—I was quite mad—we discussed the conversations that had taken place for the entire previous week as to the replacements, and I said, “You told me not to worry, and now look what it happening. How can we do the show?” He explained that one of the girls—one of the girl dancers had been rehearsed that week to replace Aleta, and within a matter of a day or two he would have a replacement for Janine.

Q. Did he say anything about who would be the replacement, if any, for Janine, that night? A. He had



planned on being the replacement himself for Janine that night.

Q. What did you say to him about that? A. "Don't be stupid."

Q. Why did you say that? A. I couldn't picture him singing Janine's songs.

Q. One of them was "Oh, my Man, I Love you so." It just didn't make sense.

Q. Any other conversations—

The Court: Did he tell you he was going that?

The Witness: He said he was going on.

Q. He told you he, a man, was going to sing, "Oh, My Man I Love You So."?

The Witness: He didn't say that; he said he was going to sing her numbers. That was one of the numbers.

The Court: Do you want the jury to understand he was going to sing "Oh, My Man, I Love You So"?

The Witness: At that point anything was possible, sir.

By Mr. Foley: Q. Then what did you do, Mr. Gerber? A. I went to find Mr. Katleman to discuss the situation with him. He didn't choose to discuss it in too much detail. He said, "Roy, it is finished; it is over. They can't present their show as they are contractually obligated to do so. Make arrangements and send them home."

I argued with him. I told him one of the chorus girls could replace Aleta in her numbers; that we would find a replacement for Janine.

He said, no, his contract was for the existing show; that was the show he wanted, and if we couldn't fulfill the contract that there was no sense in continuing the discussions.

Q. Then what did you do? A. I told him that it would not be a matter of wither his deciding or my deciding whether the contract had been fulfilled or not fulfilled. I felt a situation such as this should be discussed and decided on by AGVA.

Q. Then what occurred? A. The kids went back into their respective dressing rooms. The show started.

Q. Not the La Nouvelle Eve show? A. No, sir. Jack Wallace, the record act, was introduced. He went out, performed—

Q. All right. Then proceed. You stated that the shut-down went on. A. When you asked who was backstage, I think I neglected to mention that Mr. Haettel was there.

We then had conversations later that evening between Mr. Haettel, myself and Mr. Katleman with regard to whether or not the contract had been fulfilled or not.

Q. Was there anyone else present at those conversations? A. Peter Holmes was there. His attorney—I believe he was his attorney—was there.

Q. Where did these conversations take place? A. They took place in the steak house, I think. Later that evening Mr. Haettel and I were in the front lobby of the hotel again with Peter, because the same situation prevailed on the second show that evening.

Q. What were the discussions? A. Just 'Give us a ruling on the situation. Is it or isn't it a contract at this point? Has the contract been broken?'

Q. Did Mr. Haettel make a ruling? A. No, he did not. He chose to wait until Mr. Maezzi, who was due in town the next morning, arrived." [Rep. Tr. 2515-2520].



No. 20241

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# United States Court of Appeals

FOR THE NINTH CIRCUIT

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OPERATING Co., a Nevada corporation, BELDON R.  
KATLEMAN, MCA ARTISTS, LTD., a Delaware corpo-  
ration, ROY GERBER and MATT GREGORY,

*Appellants,*

*vs.*

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*Appellee.*

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Appeal From the United States District for the  
District of Nevada.

---

Brief of Appellants El Ranco, Inc., El Ranco Hotel  
Operating Co. and Beldon R. Katleman.

---

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**FILED**

**JAN 10 1966**

WILLIAM F. WILSON, Clerk





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No. 20241

In the

# United States Court of Appeals

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ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL  
OPERATING Co., a Nevada corporation, BELDON R.  
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ration, ROY GERBER and MATT GREGORY,

*Appellants,*

*vs.*

RENE BARDY,

*Appellee.*

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Appeal From the United States District for the  
District of Nevada.

---

Brief of Appellants El Ranco, Inc., El Ranco Hotel  
Operating Co. and Beldon R. Katleman.

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## Preliminary Statement.

Co-appellants MCA Artists Ltd. and Roy Gerber are filing a separate brief herein. Except for certain necessary overlapping, counsel for all appellants have attempted to avoid duplication of argument wherever they have deemed it feasible. However, appellants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman do adopt all matters contained in the brief of their co-appellants and do rely thereon on this appeal.

## Jurisdiction.

Jurisdiction of the District Court in this case is based on diversity of citizenship (28 U.S.C.A. 1332). It was alleged in the amended complaint that the appellee was a citizen of the French Republic, appellants Beldon R. Katleman, Roy Gerber and Matt Gregory were citizens of Nevada, appellants Elranco, Inc. and El Ranco Hotel Operating Co. were Nevada corporations and appellant MCA Artists, Ltd. was a Delaware corporation [R. 141, lines 8-9; R. 142, lines 4-7]. It was also alleged under 15 U.S.C.A. 1121 and 28 U.S.C.A. 1138(a) by virtue of the fact that the cause of action arose under 15 U.S.C.A. 1126(b), (g) and (h) [R. 141, lines 1-4].

Jurisdiction of this Court on appeal is based upon its statutory appellate jurisdiction (28 U.S.C.A. 1291) and the timely invocation, by appellants, of the prescribed procedure [Rule 73, F.R.C.P.; R. 2307].

## Statement of the Case.

Appellee has been in show business since he was ten years of age [T. 1391, lines 9-11]. In 1934 he opened a cabaret called Cabaret Eve in Place Pigalle [T. 1391, lines 15-22]. It was operated by a corporation he formed called La Fontaine Eve. Most of the stock was in his name. The balance was in the names of people who granted him the use of their names for such purpose [T. 1392, lines 2-25].

In France there are two types of societies which are closely akin to corporations.<sup>1</sup> A society anonym, whose shares are publicly held and managed by a board of directors and a society S.A.R.L., which is managed by one or more managers [T. 2023, lines 3-24]. They are

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<sup>1</sup>During appellee's testimony both corporation and society were used.



both artificial separate legal entities. They are juridical entities [T. 2017, lines 1-26].

There were several other corporations that ran Cabaret Eve, including Sedrac and Secmat [T. 1393, line 8, to T. 1395, line 6]. Appellee was a stockholder "more or less" in each of these corporations. In the societies which required capital from others he used friends' names, but it was his money [T. 1395, line 7, to T. 1397, line 12]. There were sales of shares in Secmat, but it was done from one friend to another with no money changing hands. He sold his shares in Sedrac in 1954 or 1955 and retained no interest in Cabaret Eve [T. 1395, line 8, to T. 1399, line 1].

In 1950 a club called La Nouvelle Eve was opened. It and Cabaret Eve are both in the Montmartre region of Paris. Cabaret Eve has continued to operate, but it is called Nue Eve de Paris [T. 1399, line 25, to T. 1402, line 4].

Since 1950 the land and building at 25 Rue Fontaine, where La Nouvelle Eve is located, have been owned by Mansart, which is a real estate corporation. Appellee's relatives and friends own the shares, but they purchased them with his money [T. 1403, line 1, to T. 1404, line 11]. In 1950 the club was operated by a corporation called La Nartella for two or three years. The shares of stock were held in other people's names [T. 1404, lines 16-22]. Appellee then formed Societe de Gerance de La Nouvelle Eve, which became a subtenant of Nartella, which was a tenant of Mansart [T. 1425, lines 5-22].

Both Nartella and Societe de Gerance de La Nouvelle Eve exploited the business including putting on shows during the years each of them operated the club [T. 1422, lines 19-22; T. 1424, lines 15-24; T. 1426, lines 12-23].

Appellee evicted both Nartella and Societe de Gerance de La Nouvelle Eve because of nonpayment of rent and the club was closed during 1955 [T. 1427, line 10, to T. 1428, line 3].

The club was reopened in 1956 by Societe Escarpolette, which appellee formed that year. All the stock was in the name of Mr. Francois and George Guiol. Appellee was the manager under the name Doornick [Ex. LC]. Francois and Guiol gave appellee assignments in blank of their shares of stock [T. 1428, line 12, to T. 1429, line 8]. No name was inserted in the blanks [T. 1467, lines 6-22].

Escarpolette owned the business during 1956, 1957 and 1958, and received all the money taken in from people who saw the show at the club. Appellee had an arrangement with Escarpolette whereby he received author's royalties and he had the privilege of dining at the club whenever he wanted to [T. 1434, lines 4-15; T. 1439, line 24, to T. 1440, line 13].

Author's royalties were paid by Escarpolette to the Author's Society. Appellee was not a member of the society, but he used assumed names, at first that of Madame Deryckere and later Tanya Floria, a dancer at the club. Deryckere, his ex-wife, was a member under the assumed name of de Ricaire. They gave the royalties back to appellee. This device helped him to save on his income taxes [T. 1435, line 15, to T. 1437, line 20; T. 1439, lines 2-5]. Deryckere testified that she was in fact the author, but appellee forced her to return the royalties and she received a salary only [T. 1782, line 25, to T. 1786, line 25]. There is no evidence with respect to the amounts of any royalties.

In 1956, Escarpolette produced a show called Extravaganzas; in 1957, Seduce Me, and in 1958, Shocking [T. 1433, lines 9-19].

On August 1, 1958, appellant MCA Artists, Ltd. (hereinafter referred to as "MCA") entered into an agreement whereby it became exclusive representative for appellee for North and Central America to secure engagements for the show [Ex. 73]. MCA's agent in Las Vegas was appellant Roy Gerber, who interested appellant Beldon Katleman in the show [Ex. 449].<sup>2</sup> Katleman went to Paris about the middle of October to see the show and entered into initial negotiations with David Stein of MCA's Paris office [Ex. 452]. On October 16, 1958, Stein sent a memo to Larry Barnett of MCA with a copy to Gerber, reciting that Katleman had met with appellee, the manager of Nouvelle Eve Corporation and Madame Deryckere, his artistic director, and Stein [Ex. 452]. Appellee came to Las Vegas about October 24, 1958, and he and Gerber negotiated with Katleman. Katleman did not like the production singer and several of the manikins and appellee agreed to replace them. The price was to be \$15,000 per week, including transportation. The specialty acts were to be provided by the Hotel [T. 2417, line 6, to T. 2421, line 17].

Gerber prepared a contract dated November 25, 1958 [Ex. 90], but it was not executed [T. 2426, line 25, to T. 2427, line 14].

A new contract was drawn up by Gerber about December 1, 1958 and sent to Paris [Ex. D]. It was returned to Las Vegas on December 26, signed by appellee but there were some changes written in, which changes attempted to insert something with respect to dresses, which was other than had previously been agreed upon [T. 2428, lines 7-23].

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<sup>2</sup>Katleman was at all times owner of all the stock in appellant corporations Elranco, Inc. and El Ranco Hotel Operating Co. and those corporations are hereinafter referred to collectively as the "Hotel".

Appellee again came to Las Vegas on January 2nd or 3rd, 1959, where discussions were carried on with Katleman and Gerber. The matter of the production singer and manikins was again discussed and there was a reconfirmation of the previous understanding with respect thereto [T. 2429, line 7, to T. 2433, line 7].

On January 5, 1959, Paul Sherman of American Guild of Variety Artists (hereinafter referred to as "AGVA") wrote Gerber advising that AGVA wanted a letter by the parties to the December 1, 1958 contract stating that whenever artist was used therein it meant the producer La Nouvelle Eve Corporation, and the Hotel's bond with AGVA could be applied to La Nouvelle Eve Corporation so that no separate bond would be required [Ex. 98].

The troupe arrived in Las Vegas January 19th or 20, 1959 [T. 2456, line 25, to T. 2457, line 3]. About a week before Katleman received a phone call from Gerber that there was no money to pay the transportation for the troupe to come to Las Vegas and \$12,000.00 was advanced by the Hotel for that purpose. Another \$15,000.00 was advanced before Katleman even saw one rehearsal [T. 2654, lines 4-22]. The round trip transportation cost was \$21,442.32, leaving a balance owing of \$9,442.32 [Ex. MS]. These sums advanced were amortized during the run of the show and deducted from checks paid by the Hotel [T. 2655, lines 1-4].

Although appellee had agreed to include a number which Katleman had requested, it did not exist and Tom Douglas, who worked for the Hotel, had to design a stage setting and costumes had to be purchased by the Hotel for the girls in the number. Costumes also had to be purchased for Miss Caire, the new production singer, and changes in musical arrangements had to be made which were also paid for by the Hotel and billed to the show [T. 2469, line 5, to T. 2471, line 25].



In December 1958, Escarpolette went out of business because it was convenient to appellee [T. 1456, line 20, to T. 1457, line 2]. On December 1, 1958, Escarpolette adopted a resolution which provided that as Escarpolette did not have the back rent it owed Mansart and was threatened with eviction and had definitely intended to go out of business on December 31, 1958, it was dissolving as of December 1, 1958 and Mr. Miel, its legal counsel, would be the liquidator [Ex. B; T. 1461, line 23, to T. 1465, line 2]. The resolution was signed by appellee as Rene Doornick and published in the newspaper on January 3, 1959 [T. 1459, line 20, to T. 1460, line 5].

Miel assigned to appellee, on March 9, 1960, all his rights in Nouvelle Eve Corporation, La Nouvelle Eve, Paris, La Nouvelle Eve Revue, La Nouvelle Eve Show, the company, L'Escarpolette and the name La Nouvelle Eve and his rights to all claims against the appellants [Ex. 426]. Similar assignments were obtained from Roger Francois and George Guiol [Ex. 415], Madame Deryckere [Ex. 419] and Societe Cythere [Exs. 438, 439]. (Cythere was the corporation which operated the club after it was reopened in September, 1959; the stockholders were Agedas and Hoffman, who bought their stock with appellee's money and then assigned it in blank [T. 1523, line 18, to T. 1526, line 1]). All of the assignments were made while this action was pending [Exs. 415, 419, 438, 439].

Murray Richards, the attorney for the French Consul General in San Francisco, and an expert on French law, testified that P.P. is an abbreviation for par procuration. A literal translation is by procuration or by power of attorney. Under French law, P.P. indicates the person affixing the letters to his name is acting under a general power of attorney to act on behalf of someone else. A person would not properly sign on his



own behalf a signature coupled with the letters P.P. The letters P.P. would be a way of indicating the signer is signing on behalf of someone else [T. 2011, line 19, to T. 2014, line 6]. Richards testified that the signature P.P. R.Bardy meant that Bardy was acting as an agent for someone else [T. 2028, lines 18-24]. Appellee testified he used P.P. in front of his signature when he signed for Escarpolette [T. 1480, lines 1-2].

The letters P. O. are an abbreviation for the French words *par ordre*, which translated means by order [T. 1478, lines 4-24]. Appellee testified that he used P. O. in front of his signature when it was not for himself personally and when he signed for a society and the letters meant that he was signing for the management of the society [T. 1472, line 25, to T. 1473, line 3; T. 1477, line 18, to T. 1488, line 3].

Appellee received a draft of the contract from Stein in Paris around November 25, 1958, the date on the draft [T. 1132, line 7, to T. 1133, line 5]. Appellee testified that at first the contract was done in the name of Bardy "and after that we add 'corporation'", which word he saw on the contract on November 25, 1958 [T. 1135, lines 10-25]. He took it to a translator, Madame Fagon, who gave him a written translation [T. 1134, lines 4-17]. Appellee testified that Mrs. Fagon had told him that if he had a Monte Carlo corporation it would not have to pay French taxes. Appellee needed a Monasque for incorporation purposes and he wrote a friend in Cannes to get him such a person. He used on stationery the address of that person as the address of the main office of La Nouvelle Eve Corporation in Monte Carlo [T. 1140, line 20, to T. 1145, line 25; T. 1157, lines 3-10].

About a month after the contract with the Hotel was signed [T. 1156, line 4, to T. 1157, line 2], appellee and his secretary prepared an agreement between

La Nouvelle Eve Corporation and Madame Deryckere, his ex-wife, in which she was to receive 25,000 francs per day as author for each day that the show appeared in Las Vegas. That agreement was on La Nouvelle Eve Corporation stationery, which stationery had a government stamp thereon so as to give it "legal validity." The agreement was signed "Pour la Nouvelle Eve Corporation P.O. R.Bardy" [T. 1484, line 11, to T. 1487, line 4]. In the agreement with Deryckere, which appellee testified he and his secretary prepared [T. 1487, lines 2-4], the words "Nouvelle Eve Corporation" appear six times in the one page agreement. It states that appellee represents the corporation. It refers to the corporation as an enterprise which is the license holder of the Revue Shocking being presented in Las Vegas from January 28, 1959 to April 7, 1959 and that the corporation will present the show according to Deryckere's instructions. It provides the agreement is valid only for the corporation's revue in Las Vegas and if it will appear at another place the corporation will inform Deryckere by registered mail.

A contract between La Nouvelle Eve Corporation and American Guild of Variety Artists (AGVA), dated January 15, 1959, was signed "Pour la Nouvelle eve corporation P.O. R.Bardy" [Ex. 105].

Harold Conner is a Las Vegas accountant, who was retained by appellee at the end of January, 1959 as the accountant for La Nouvelle Eve Corporation of Monte Carlo [T. 1819, line 18, to T. 1821, line 3]. He had almost daily dealings with Peter Holmes, appellee's interpreter, in conjunction with the show [T. 1821, lines 4-25]. According to appellee he was in charge of the money received for the show, receiving all checks therefor [T. 1552, lines 12-20].

At Conner's first meeting with appellee, the corporate structure was discussed [T. 1849, lines 8-14]

and he was instructed to open a bank account in the name of La Nouvelle Eve Corporation of Monte Carlo and appellee told Conner that he had a rubber stamp which he had made in Paris [T. 1563, line 20, to T. 1564, line 7] that could be used on the checks until checks could be printed. He gave Conner the rubber stamp [T. 1849, lines 8-14]. The account was opened at a Las Vegas bank in the name of Harold P. Conner and Rene Bardy as trustees for La Nouvelle Eve Corporation and Conner and appellee were signatories until appellee left for France in March, 1959 when, pursuant to his instructions, Peter Holmes' name was substituted for that of the appellee. Appellee signed the bank signature card while Holmes was present and appellee knew its purpose. That bank account was maintained through June 2, 1959, the entire run of the show [T. 1837, line 4, to T. 1838, line 6; T. 1547, line 13, to T. 1548, line 18]. The stamp was used on hundreds of checks signed by appellee, and appellee and Holmes signed hundreds of checks after they were printed with the name La Nouvelle Eve Corporation of Monte Carlo [Exs. 529, 530]. The stamp was also used on other items such as withholding statements [Ex. 515].

Conner took care of all records for the show and made all necessary reports to the appropriate governmental agencies. Social Security and Income Tax withheld was reported on a quarterly tax report and unemployment insurance and Nevada Industrial insurance were reported and paid to the State of Nevada. All reports and payments were in the name of La Nouvelle Eve Corporation [T. 1838, lines 7-24; Exs. 513, 515, 516].

At Conner's first meeting with appellee, the latter raised the question of the nontaxability of French residents employed in the United States and requested tax advice, and Conner said he would research it [T. 1835,

line 18, to T. 1836, line 14]. On March 2, 1959, Conner wrote to appellee, as president of La Nouvelle Eve Corporation, advising that the Internal Revenue Service concurred with his findings that appellee and members of the shows were not subject to income tax so long as they stayed less than 183 days in the United States, but there was still a question with respect to the taxability of the corporation and a ruling had been requested from Washington, and that the employees and the corporation were subject to FICA (social security taxes). Conner enclosed a copy of the letter from the Internal Revenue Service [T. 1876, line 1, to T. 1880, line 1; Exs. M, M-1].

Appellee thereafter wrote Conner (undated), acknowledging Conner's letter and advising that he was aware of the treaty and its effect and . . .

"Concerning Eve Corporation, let us say that there is not really such, since it was AGVA which did not wish to mark 'Artist' in their contracts, but 'Nouvelle Eve Corporation'. N.E. Corp., is not therefore, a society or a company, but an individual of French nationality.

"Therefore the accounts may be done in the name of Bardy under the N.E. Corp, and this will avoid any tax problem.

"On the other hand if we do our accounts in the name of N.E. Corp, we must mark into the accounts all of the expenses occurred in France. That is to say, Author's rights, copyrights, costume costs, shoes, wigs, hats, rehearsals, music, etc., and you will find with this a list of these expenses.

"If you establish the accounts in the name of Eve Corp., instead of copying all these expenses, you can simply mark in the accounts.

M. Bardy's expenses \$1,000

Paris costs \$2,500 Total \$4,000 [sic]



“Please help yourself to the list of Paris expenses in case you have need of them. I have all justifying evidence concerning my expenses and I beg of you not to let them be misplaced as I do not know if my secretary in Paris has a copy of these expenses.”

Except for the foregoing letter [Ex. 157], appellee never gave Conner any further instructions with respect to La Nouvelle Eve Corporation [T. 1845, line 14, to T. 1846, line 3].

Appellee received \$37,000.00 in the form of checks drawn on the corporate account. As there was no resolution with respect to officer's salary, and under standard accounting procedure, Conner treated appellee as a corporate employee and showed the \$37,000.00 as advances to employee. No taxes were deducted therefrom [T. 1839, line 10, to T. 1840, line 6; T. 1870, line 5, to T. 1871, line 2; T. 1873, line 21, to T. 1874, line 8; Ex. 513].

In July 1959, La Nouvelle Eve Corporation filed federal tax returns and paid federal taxes. Returns and taxes were also paid to Nevada agencies at the same time [T. 1881, line 4, to T. 1884, line 5, Ex. 522]. On October 2, 1959, appellee, on an Employer's Federal Tax Return form for the corporation, wrote the Internal Revenue Service regarding the corporation's show at the El Rancho Vegas Hotel and that from April 8 to June 2, 1959, La Nouvelle Eve Corporation did not receive any money [Ex. 378].

Aleta Morrison, the solo dancer in the show, was an exciting dynamic performer [T. 2575, line 21, to T. 2576, line 3]. She was the highest paid performer, receiving \$275.00 per week [T. 1572, line 19, to T. 1573, line 1]. She and Janine Caire, the production singer, excelled [Exs. NB, NC-1]. Caire received the second



highest salary, \$200.00 per week [T. 1573, lines 9-10]. Of the 32 performers in the show, 19 of them, including Aleta Morrison, belonged to the Charley Ballet owned by Charley Henchis, who had a contract with appellee with respect to his troupe [Exs. 57, 91; T. 1292, lines 15-24]. The Charley Ballet was a line of girls [T. 2053, lines 18-26]. Henchis hired and had British Equity contracts with all of his troupe [T. 1292, lines 20-22; T. 2055, line 17, to T. 2056, line 18]. The contracts were for six weeks, plus a four weeks option and an additional option, except for Aleta Morrison, who had a contract for six weeks plus only one four week option. Aleta Morrison had previously appeared at La Nouvelle Eve in Paris, but because of illness had left and returned to England. Appellee had requested Henchis to obtain her services for the Las Vegas opening and Henchis went to London and prevailed upon her to come to Las Vegas for six weeks plus a four weeks option. Everyone knew that she was returning to London at the end of that time [T. 2056, line 13, to T. 2058, line 24].

Janine Caire was appearing in Philadelphia when appellee called her from New York. She was hired at \$200.00 per week with the promise of more money if the show went well [T. 1907, line 3, to T. 1909, line 7]. She repeatedly asked appellee for a contract, but never got one [T. 1914, lines 1-6]. She met appellant Matt Gregory in Las Vegas in January, 1959, and he became her manager [T. 1937, line 23, to T. 1938, line 5; T. 2303, line 7, to T. 2304, line 12]. He was a personal manager of performers in the entertainment industry [T. 2299, lines 9-19]. Under paragraph 11 of AGVA Rules, all performers were required to have contracts [T. 1642, lines 2-19, Gregory Ex. A]. Gregory asked appellee for a contract and a \$100 a week raise, but was advised he would think about it. After appellee

left for Paris on March 6, 1959, Gregory spoke to Holmes and subsequently to Regis Durieux, who took appellee's place as manager, but received no satisfaction [T. 2309, line 22, to T. 2321, line 3].

After the four weeks option had been picked up extending the show for a total of 10 weeks ending April 7, 1959, negotiations were opened to extend the show beyond April 7, 1959. Gerber called Katleman, who was in New York, and arranged an appointment for him with appellee in Las Vegas. Appellee agreed to the meeting [T. 322, lines 7-25]. As soon as the meeting was arranged, Peter Holmes, appellee's interpreter and a dancer in the show, testified that appellee "walked out of the office and said that he was going to get on the first plane to Paris [and] did exactly that [T. 323, lines 1-13].<sup>3</sup> Katleman arrived three days later for the scheduled meeting and was enraged when he discovered that appellee had left [T. 323, lines 14-21].

Before appellee left he and Gerber discussed the extension and Gerber asked him if there were contracts

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<sup>3</sup>Appellee testified that although he had an appointment to see Katleman he left on March 6, 1959 because he wanted to prepare his Paris opening for April, but that he did see Katleman at the airport in Las Vegas when he was leaving, but they did not talk [T. 1187, line 7, to T. 1189, line 14]. He also testified that he waited three days for Katleman and could wait no longer [T. 1579, lines 21-25]. In a March 6, 1959 letter to Gerber, appellee said that "I feel it is needless that I stay to talk to Mr. Katleman" [Ex. 469]. On April 2, 1959, appellee wrote Gerber and gave his reason for leaving as follows:

"Therefore, Mr. Gerber, did I become angry—after coming especially from Paris—with a secretary, for five days, before signing the contract, to discuss necessary work: and upon arriving I found no one, then I was given an appointment at 10:00 A. M. in the morning but did not get the acknowledgement until 6:00 P.M. in the evening with Mr. Katleman and then he only gave me ten minutes in five days. . . . When I wanted to salute him and say goodbye upon my departure the message was sent to me that Mr. Katleman was in a conference and could not be disturbed. . . . did I express any resentment?"

in force with the performers in the show and if he could guarantee the continuance of the show as it then stood. Replacements for two manikins requested by Katleman were also discussed [T. 2500, lines 7-23]. Appellee told Gerber that he would take care of the replacements when he returned to Paris [T. 2500, lines 19-23]. He also gave Gerber, through Holmes, a letter on March 6, 1959 [T. 2488, lines 15-22] guaranteeing the extension of the contracts which letter said in part as follows:

“You have asked me if I could guarantee the extension of contracts of the performers. Except for Miss Henriette, who will be replaced, since she only signed for ten weeks and does not wish to re-negotiate her contract, there will be no replacements. I can guarantee that the other artists will stay, and in case there should be a necessity for replacement I will take care of this from Paris.”

Before he left for Paris on March 6, 1959, appellee also signed a contract between La Nouvelle Eve Corporation and appellant El Ranco Operating Co., which provided for an eight week extension commencing April 8, 1959, pursuant to the terms therein provided [Ex. 472]. Katleman was reluctant to sign the new contract on his return because he was told that Morrison and Caire might not remain with the show and he felt appellee was stalling him about the promised replacements [T. 2655, line 13, to T. 2658, line 5]. He had numerous conferences with Gerber and Gerber showed him appellee's letter guaranteeing the performers' contracts [Ex. 469] and Katleman finally signed the extension agreement about March 13, 1959 [T. 2658, line 18, to T. 2660, line 6; T. 2490, line 24, to T. 2491, line 10].

Under the extension agreement the first two shows each night were to be abbreviated versions. Joe E. Lewis was to be the star [T. 2487, line 19, to T.

2488, line 12] and “In place of the stipulated \$15,000.00 weekly payment by Operator to Artist<sup>4</sup> . . .” as the December 1, 1958 contract provided, the Hotel would pay the Artist as full payment all the salaries and expenses of the show, including that of Henschis, and the commission to MCA and \$5,000. per week to appellee [Ex. 472]. This method was used so that appellee would not have to pay taxes on the money [T. 2711, lines 8-21].

On or about March 26, 1959, Regis Durieux arrived in Las Vegas from Paris bringing a letter to Gerber and Katleman from appellee that he was the substitute for appellee to watch over the progress of the show [Ex. E]. Gerber was under the impression that Durieux would bring the new manikins with him and someone to replace Henriette Charmat and when he didn't Gerber wrote appellee on March 26, 1959 inquiring when they would arrive [T. 2503, lines 1-5; T. 2509, lines 2-13; Ex. 475].

At the time appellee signed the new contract on March 6, 1959, Gerber told appellee that neither Morrison nor Caire were under contract and appellee said it didn't matter, it would be taken care of [T. 1604, line 14, to T. 1605, line 1]. On March 13, 1959, appellee wrote Holmes confidentially: “. . . Concerning Aleta, if she does not continue after the ten weeks agreed upon, and if Charley asks you for her return trip, you will tell him, ‘See Mr. Bardy, since he hasn't given me any instructions concerning Miss Aleta Morrison.’ Don't bring up these questions if Charley doesn't talk to you about them.” [Ex. 191]. On March 24, appellee wrote to Holmes taking the position that Katleman was annoying him and that if Katleman “continued to make demands he would put another French show in a com-

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<sup>4</sup>“Artist” in the December 1, 1958 contract was La Nouvelle Eve Corporation [Ex. Hotel D].



peting establishment and preclude Katleman from getting any other French show from Paris by going to the local union.” He requested Holmes to obtain the name of a good Las Vegas lawyer. He said he would not replace the manikins [Ex. 207]. Gerber spoke to Holmes or Durieux at least four or five times a day about the Morrison and Caire contracts and they told him not to worry and that appellee would be in Las Vegas on April 6, 1959. He also attempted to get Morrison to remain after April 7, but she told him of her reasons why she had to return home and that appellee was aware of them [T. 2509, line 24, to T. 2511, line 14].

Appellee testified he was aware on March 25th or 26th that Katleman was contemplating closing the show after April 7, 1959, if the problems were not corrected [T. 1617, lines 17-20]. On March 31st Durieux wired appellee that “situation grave” and requested appellee to telephone him [T. 1621, lines 11-16; Ex. 212]. Appellee wired Durieux the same day “No use telephoning. Situation will perhaps be grave April 8. See Peter for attorney. Have complete confidence in American justice.” [T. 1622, lines 17-22; Ex. 220].

On April 1st, Gerber wrote Katleman at the latter’s request that he had not heard from Bardy with regard to the replacements [T. 2505, lines 2-9; Ex. 222]. Caire and Morrison also wrote letters stating they would not appear after April 7 [Ex. 222]. Tom Douglas, the hotel producer, had also written a letter stating that several members of the cast did not wish to remain beyond April 7th [Ex. 222].<sup>5</sup> Around April 1st, Katleman

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<sup>5</sup>The authenticity of this letter is in dispute [T. 469, line 13, to T. 474, line 5]. Douglas did know that Morrison was returning to London after April 7 and she was a house guest in his home in Los Angeles before she returned to London [T. 1989, line 10, to T. 1990, line 16].



told Haettel, the local AGVA representative, that Caire and Morrison did not have contracts to perform after April 7 and he told Katleman nothing could be done at the time. Haettel questioned Caire and Morrison and they verified that they had no contracts [T. 2141, line 25, to T. 2144, line 18]. He testified that under AGVA rules all performers had to have written contracts [T. 2146, lines 4-19].

On April 7th, Caire told Durieux she would not perform on April 8th [T. 286, lines 2-9]. She was upset and after the last show on April 7th, Gregory drove her and Morrison to Los Angeles where they were checked into a hotel [T. 2322, line 11, to T. 2324, line 9].

On March 31st, appellee sent a letter to Holmes giving him complete instructions as to what to do on the night of April 8th such as “. . . Present yourself, with the troop on April 8 and 9, accompanied by a Bailiff . . . Better do not pack the costumes. We are supposed to continue . . . For Henriette [Charmat] let her obtain a doctor's certificate stating she is sick. This could serve our purpose eventually . . .” He also instructed him to make an appointment for Durieux to visit the French Consul in Los Angeles on April 9th [T. 1585, line 13, to T. 1591, line 26; Ex. I]. On April 6th, appellee wired Gerber that if there was a termination of the contract he would sue [Ex. 239].

On the night of April 8th Holmes offered to do the part of Caire in the show, including singing the same songs, and Jennifer Till, a dancer in the show was to do Morrison's act [T. 278, line 5, to T. 279, line 14]. A Hotel security guard advised the show could not go on [T. 1224, lines 7-22]. Present was Russell B. Taylor, a Las Vegas attorney, together with a local constable, while a roll call was taken of the troupe [T. 1217, line 1, to T. 1221, line 3]. His law firm had been retained by La Nouvelle Eve Corporation [T. 1241, line 24, to

T. 1242, line 7]. The firm was paid by a corporate check [Ex. 529 ABR]. He had a typewritten roster of the cast which had at the top the words "La Nouvelle Eve Corporation". He had been retained on April 8th and informed that there might be a claim of anticipatory breach of contract by reason of absence of members of the cast [T. 1245, line 18, to T. 1250, line 16].

Instead of the La Nouvelle Eve show, Monique Van Vooren and Jack Wallace performed. Wallace had previously been hired by the Hotel to replace George Matson, one of the specialty acts, and Van Vooren had been standing by if the show had to be replaced [T. 2535, line 25, to T. 2536, line 12; T. 2668, lines 8-20].

Haettel was requested to give a ruling for AGVA, but he told Gerber, Henschis, Katleman, Holmes and attorney Taylor that he would wait until Irvin P. Mazzei, the Western Regional Director of AGVA arrived the next day [T. 2519, line 18, to T. 2520, line 15]. Mazzei, who was in Salt Lake City, was called and arrived in Las Vegas on the night of April 9th [T. 2214, line 21, to T. 2216, line 14]. Continuous meetings were held for two and one-half days with Katleman, Gerber, Henschis, Holmes and Haettel. During this period Mazzei did not sleep [T. 2221, lines 1-21].

Katleman insisted to Mazzei that there was a breach and Mazzei said that if it was protested it would have to be submitted to arbitration and he was risking eight weeks' expenses and Katleman said he would take the chance [T. 2226, lines 9-25]. Mazzei told Holmes that unless the troupe was paid salary he had no alternative but to make arrangements for transportation back to Paris [T. 2225, lines 1-20]. Mazzei said that it was AGVA's position that the dispute could only be settled in arbitration and that we could only make demands that the kids be paid or returned to France [T. 2252, lines 8-12].

On April 9th Holmes said he would try to contact appellee and in Mazzei's presence placed the call. Holmes told Mazzei that appellee was not available, but could be reached within three hours. The call was replaced and Holmes was advised that appellee would not be available until the afternoon of April 10th [T. 2228, line 5, to T. 2230, line 25].

Durieux had cabled appellee on April 8th that the troupe was not working, AGVA declared the troupe incomplete and appellee should contact Jackie Bright [Mazzei's superior] in New York [Ex. 244]. On April 9th appellee sent a wire to Durieux that his representative would be in Las Vegas Monday (April 13th) and to be present every night with the troupe and a bailiff [Ex. 260]. On April 10th appellee sent Durieux a "confidential" cable stating the trip of his representative was cancelled, attorney should be instructed to ask for execution of contracts and return troupe [Ex. 269]. The same day Gerber wired Stein in Paris that appellee's presence might have saved the situation and the only alternative was to make arrangements to return the troupe [Ex. 264].

The show which opened on April 8th did no business and the Hotel was losing money. Monique Van Vooren had never appeared as a soloist or star in a Las Vegas show. Because of the shortness of time, Katleman was unable to get a line of girls to back her up. As a result Katleman agreed that the show could come back starting April 15th in a modified form and the Hotel would pay all expenses plus \$2,000.00 per week to appellee [T. 2667, line 16, to T. 2668, line 24; T. 2538, line 11, to T. 2539, line 2]. Durieux agreed to call or cable appellee with respect to the proposition and apparently did reach him on the phone [T. 306, line 2, to T. 307, line 5].

On April 11th appellee wired Durieux "Impossible to give authorization to sign prior to confirmation of MCA requested by cable" [Ex. 272]. The same day appellee wired Gerber "Regis informs me new propositions Katleman please confirm directly immediately by cable extremely important" [Ex. 270]. The same day Gerber wired appellee confirming the proposition and advising acceptance [Ex. 271].

After appellee's return to Paris on March 6th, Madame Deryckere saw him every day at his apartment. Stein called appellee many times, but appellee would not talk to him. She relayed Stein's message to appellee [T. 1756, line 20, to T. 1759, line 21]. Appellee told her to wire Durieux "I agree for \$2,000 or \$2,500" and she sent the wire from appellee's telephone in his apartment [T. 1767, line 14, to T. 1770, line 20].

On April 11th or in the early morning hours of April 12th, Durieux, through Holmes, informed Gerber that the proposition was acceptable to appellee [T. 2539, lines 13-17] and the show went back into rehearsal. A new contract was prepared. Durieux said he had authority to approve, but not to sign it. It was sent to appellee, but never returned [T. 2577, line 11, to T. 2578, line 3]. A meeting of the cast was held, at which new plans were explained. Mazzei spoke to the cast and told them AGVA would rule they were entitled to half salary for one week or alternatively they could return to Paris or work elsewhere [T. 2544, line 21, to T. 2545, line 15]. Some accepted the half salary, which was advanced by the Hotel [T. 2665, line 6, to T. 2666, line 8]. Some of the cast returned to Paris and others went to work elsewhere and the show began on April 15th with at least nine or ten less performers than it had before [T. 2546, lines 5-19]. On April 15th, Durieux wired appellee that the troupe went back to work that day [Ex. 284]. The show continued through June 2,



1959 with a cut version [T. 315, line 18, to T. 316, line 2]. It was completely revised. Till did not do the Morrison part [T. 295, lines 9-21]. Caire appeared in the show until June 2, 1959. She received \$300 per week pursuant to the terms of an AGVA contract with the Hotel dated April 12, 1958 [T. 2325, line 25, to T. 2326, line 5; Ex. 275].

After June 2, 1959, the remaining personnel in the show returned to Paris [T. 2036, lines 4-22]. La Nouvelle Eve was closed for repairs. Appellee could not be found [T. 2039, line 2, to T. 2040, line 17]. Before leaving Las Vegas Henchis attempted to reach appellee by phone, but was unable to do so. He also cabled appellee from Las Vegas, but received no reply. Upon his return to Paris his lawyers were also unable to reach appellee [T. 2041, line 12, to T. 2043, line 16]. Henchis was told by people in Paris that La Nouvelle Eve would not reopen because of tax problems [T. 2047, line 8, to T. 2048, line 10].

After the show closed in Las Vegas on June 2, Henchis called Gregory from Paris and informed him that he was afraid he would not have work for his line of girls in Paris [T. 2332, lines 1-25]. Gregory flew to Paris and a contract dated June 8, 1959, and signed later, was entered into whereby Gregory would book the Charley Ballet in the United States [Ex. 334; T. 2329, line 16, to T. 2330, line 6]. The Charley Ballet was booked into the Hotel and appeared there from July 29, 1959 through October 21, 1959. It was billed as "Les Girls de Paris," not as a major attraction, but solely as a line of girls on the bill. The star of the show was Joe E. Lewis. The show was entirely different in all respects from the prior shows [T. 2093, line 19, to T. 2094, line 10]. The show was advertised as "La Nue (nude) Eve." [Exs. 109, 141a, 141b, 141c].



### Specification of Errors.

1. The Court below erred in denying appellants' motion for a directed verdict on the ground that the Nevada fictitious name statute (N.R.S. Chapter 602) barred appellee's claims.

2. The Court below erred in not submitting to the jury the issue of whether appellee was "transacting business" in Nevada within the meaning of the Nevada fictitious name statute (N.R.S. Chapter 602).

3. The Court below erred in ruling that appellee was not estopped to deny the corporate existence of La Nouvelle Eve Corporation.

4. The Court below erred in not submitting to the jury the issue of whether appellee should be estopped to deny the corporate existence of La Nouvelle Eve Corporation.

5. The Court below erred in denying appellants' motion for a directed verdict on the ground that appellee was not the proper party in interest and that indispensable parties were not joined.

6. The Court below erred in not ruling that the December 1, 1958 and March 6, 1959 contracts were unambiguous with respect to who the contracting parties were.

7. The Court below erred in refusing to instruct that there was no evidence that the appellee owned the night club in Paris.

8. The Court below erred in admitting in evidence assignments to appellee of rights and claims, which assignments were executed after the action was commenced, and objection to which was made "... on the ground that it is not within the scope of the cross-examination; it is immaterial and irrelevant; that if the assignments, which they purport to be, the assignments would have to be dated prior to the commencement of the action." [T. 1646, lines 5-9].

9. The Court below erred in ruling as a matter of law that appellee was not required to arbitrate before commencing this action.

10. The Court below erred in refusing to instruct the jury that evidence of the alleged conspiracy had to be clear and convincing.

11. The verdict against appellant El Rancho Hotel Operating Co. for breach of the December 1, 1958 contract is not supported by any evidence.

12. The conspiracy verdict is not supported by any evidence.

13. The Court below erred in denying appellants' motion for a directed verdict with respect to appellee's claim under the Lanham Act on the ground that a naked claim of unfair competition did not come under the Lanham Act.

14. The Court erred in instructing the jury on the issue of damages with respect to trade name infringement under the Lanham Act by instructing that on the conspiracy issue it could consider damages suffered by reason of injury to the reputation of the trade name La Nouvelle Eve and by reason of confusion as to the source of production in violation of appellee's rights as owner of such trade name.

15. The misconduct of appellee's counsel in apprising the jury on the tax consequences of a verdict in favor of appellee was prejudicial error.

16. Appellants El Rancho, Inc., El Rancho Hotel Operating Co. and Beldon R. Katleman were not liable for conspiracy.

17. The Court's conduct in permitting appellee to testify without foundation to broad conclusions, the constant interruption of the cross-examination of the appellee and the limitation of such cross-examination and the Court's impatience with respect thereto, the

constant interruption of appellant Gerber's direct testimony and his cross-examination during such direct testimony and the misconduct of appellee's counsel deprived appellants of a fair trial.

18. The Court below erred in denying appellants' motion for a mistrial on the ground that appellee was permitted to testify to broad conclusions and that by reason of the Court's conduct the jury could have inferred that the burden of proof was on the appellants.

19. All specifications of error contained in the brief of co-appellants and to which reference is hereby made.

### **Summary of Argument.**

The Nevada fictitious name statute (N.R.S. Chapter 602) requires persons carrying on or transacting business in Nevada under an assumed or fictitious name or designation to file a sworn fictitious name certificate. The statute bars a person who fails to file such certificate from commencing a suit "upon or on account of any contract made or transaction had under such fictitious or fanciful name or designation, nor upon or on account of any cause of action arising or growing out of the business so carried on under such name or designation." The appellee filed no certificate. The evidence shows that appellee carried on and transacted considerable business in Nevada under the name La Nouvelle Eve Corporation. Therefore, the statute barred him from suing on the December 1, 1958 contract. It also barred the conspiracy claim because it was one allegedly "arising or growing out of the business" carried on under the fictitious name. Appellants' motion for a directed verdict on the issue should have been granted or at least the issue of whether appellee transacted business within the meaning of the statute should have been submitted to the jury.

Under the doctrine of estoppel to deny corporate existence a person who holds a business out as a corporation is estopped to deny the existence of that corporation and cannot sue individually on claims arising in favor of such a corporation even though it has no legal existence. Both the December 1, 1958 contract upon which appellee was awarded a verdict for its alleged breach and the March 6, 1959 contract out of which the alleged conspiracy arose were executed by appellee on behalf of La Nouvelle Eve Corporation, a Monte Carlo corporation, which appellee testified he intended to form so as to save taxes. Although he apparently never did form such a corporation, he nevertheless conducted considerable business over a period of time under such name, entered into various agreements under that name and invariably used in front of his name, the letters "P.P." or "P.O.", each of which, under French law, designates the signer is executing in a representative capacity. All of the transactions of the show in Las Vegas were carried out in the name of La Nouvelle Eve Corporation and everyone dealing with the show regarded it as a corporation, including its accountant and various state and federal agencies. Appellee is experienced in corporate dealings and has formed and dissolved numerous French corporations which he controlled through the device of blank stock powers from stockholders of record who purchased the stock with his money. In view of appellee's background, his holding out the business which came to Las Vegas as a corporation and the considerable business transacted in that name, he is estopped from contending that La Nouvelle Eve Corporation did not exist and that the claims alleged belonged to him personally and not to such corporation. Again, at the very least, the estoppel question should have been submitted to the jury.

The December 1, 1958 and March 6, 1959 contracts were unambiguous with respect to the contract-



ing parties. Those parties were La Nouvelle Eve Corporation and appellant El Ranco Hotel Operating Co. Under such circumstances the Court below erroneously denied appellants' motion for a directed verdict on the ground that appellee was not the proper party in interest and indispensable parties were not joined.

The nightclub in Paris was owned by a corporation (Mansart) and always operated by various tenant corporations, all of which were controlled by appellee through blank stock powers. Appellants objected to an instruction that the jury could consider on the issue of damages the claimed deprivation of appellee of performers in a show in 1959 at appellee's nightclub in Paris and requested an instruction that there was no evidence that appellee had any nightclub, which was refused. As such nightclub was not owned by appellee, and in fact a new corporation controlled by appellee (Cythere) reopened the nightclub in 1959, and the jury, in its award of damages, could have considered the claimed deprivations of performers, the failure to give the requested instruction was prejudicial error.

Over objection the Court admitted into evidence four assignments to appellee of all rights in La Nouvelle Eve Corporation, La Nouvelle Eve, Paris, La Nouvelle Eve Show, the name La Nouvelle Eve and Escarpolette (the corporation which operated the nightclub in 1958, immediately prior to the show coming to Las Vegas). The assignments also purported to assign to appellee all rights to the claims against appellants. The assignors were the liquidator of Escarpolette, Cythere, a new corporation which reopened the nightclub in 1959, the Escarpolette stockholders and Madame Derychere, appellee's ex-wife who claimed an interest in the show. All of the assignments were dated after the commencement of the action. A recent Ne-



vada decision, *Thelin v. Intermountain Lumber*, 80 Nev. 285, 392 P. 2d 626 (1964), holds assignments dated after commencement of an action do not relate back to the time of commencement of the action and the assignee under such an assignment cannot recover. Nevada law also holds invalid an assignment of a cause of action for fraud or similar tort. Furthermore there can be no assignment of claim for trade name infringement unless the good will of the business is also assigned. The admission of the assignments requires reversal because there is no way of knowing what effect the jury gave to them or any of them.

Under the December 1, 1958 contract, the contracting parties agreed to abide by AGVA By-Laws, which required arbitration of disputes prior to suit. AGVA's representative ruled that the dispute would have to be settled by arbitration. None was here sought. Decisions hold that agreements to arbitrate include tort as well as contract disputes. The Court below erred in ruling as a matter of law that appellee was not required to arbitrate.

The Court below refused to instruct the jury that evidence of the conspiracy had to be clear and convincing and instead instructed that the proof required was only a "clear preponderance". It did not define those words. Overwhelming authority requires proof in a conspiracy case to be considerably more than by a preponderance and the failure to instruct as requested was prejudicial error.

A verdict against appellant El Ranco Hotel Operating Co. for breach of the December 1, 1958 contract was returned in the sum of \$27,281 which was reduced by remittitur to \$24,300.66. Remittitur was based on the assumption that the jury miscomputed interest on \$18,600 claimed by appellee. The sole evidence purport-

ing to support the \$18,600 figure was appellee's testimony to leading questions, without proper foundation, over objection, that he was owed \$18,600, but that it "can be more; it can be less. The account must be made at the end of the contract." Appellee did not handle the books nor receive any of the checks paid by El Rancho Hotel Operating Co., and in fact was in Paris during the last month the contract ran. According to the records of the accountaint for La Nouvelle Eve Corporation there was no money owed on the contract. Furthermore, although performance was an issue provided for in the Pre-Trial Conference Order, the only evidence offered on the issue was an affirmative answer, over objection, to the question ". . . did you perform all contracts between you and the El Rancho Vegas Hotel?" Moreover there was no contract in evidence between appellee and the named hotel. Manifestly such evidence dos not support the verdict on the claim for breach of contract.

Nevada law, which is here applicable, is unusually strict with respect to proof of damages, requiring substantial evidence as to the amount of damage. A recent Nevada decision, *Knier v. Azores Construction Co.*, 78 Nev. 20, 368 P. 2d 673 (1962) reversed a damage award in favor of a motel owner based on delay in moving and rehabilitating a motel on the ground that there had been no established business based on the loss of profits for such a length of time as to make the loss of profit reasonably ascertainable. Here appellee never introduced one iota of evidence as to what he had ever learned and the Court below even commented to such effect. He had no established business. All prior corporations which ran the nightclub in Paris were evicted or dissolved. Thus, under Nevada law there existed no proof of damages to sustain the conspiracy award.

No cause of action exists under the Lanham Act for acts of unfair competition which do not involve infringement of a federally registered trademark or an unregistered trade name. *Shaffer v. Coty, Inc.*, 183 F. Supp. 662 (S.D. Cal. 1960). La Nouvelle Eve was neither. It was merely the name of a nightclub in Paris, and was not connected with any business, except corporations which were evicted or were dissolved and a new corporation which reopened the nightclub in September, 1959. Therefore, it was not protected under the Lanham Act. The Court below denied a motion for a directed verdict on appellee's claim under the act and instead instructed that damage to the *trade name* La Nouvelle Eve could be considered on the conspiracy issue. This was error.

Appellee's counsel had been repeatedly warned during trial not to make "speeches". Nevertheless, during final argument by MCA counsel he made a "speech" in which he apprised the jury that a verdict in favor of appellee would be taxable. It is well settled that it is improper for counsel to do so. Here it was deliberate misconduct and could well have played a large part in the enormous verdict.

Argument with respect to conspiracy issues is contained in co-appellants' brief. The only phase here argued is that the conspiracy claim is premised on what occurred on April 8, 1959, and events occurring shortly prior thereto resulting in the non-appearance of Morrison and Caire on that night. Even assuming the Hotel and Katleman were in some way involved in their absence, there could only be a breach of contract claim.

No cause of action exists against a party to a contract for conspiracy to breach the contract. Furthermore, the appellee was well aware that Morrison was returning to London and Caire would not perform without a contract and a raise, yet he did nothing about it. He had guaranteed their performance and was well aware for sometime that their nonappearance would be interpreted as a contract breach. He precipitated the entire situation on April 8, 1959, preparing either for Katleman to back down and have the show to go on or for litigation. He later agreed to an abbreviated show at a lesser fee and then backed off. Under such circumstances there was no conspiracy.

This case was tried in Carson City, Nevada, approximately 450 miles from Las Vegas where it was filed and where counsel for appellants and appellee practiced. No party or witness resided in or near Carson City. The case was transferred there for trial on short notice. Argument concerning the place of trial is treated in co-appellants' brief. Besides the obvious difficulty of trying a lawsuit under such circumstances counsel was under considerable pressure by the Trial Judge to speed up the trial. The Court admitted such pressure but stated there was pressure on him to complete the trial because another judge needed the court. During the direct examination of appellee, the Court permitted him to answer broad leading questions without foundation of any kind, some of which were propounded by the Court itself. A mistrial was requested by reason of the Court's conduct on such examination, but the motion was denied. The cross-examination of appellee, portions of



which are contained in Appendix "A" hereto, was constantly interrupted by the Court, the Court sustained its own objections to questions asked, it took control of the cross-examination on numerous occasions, charged counsel with being unfair to the witness, advised in effect that appellee had not been discredited and on many occasions, by its questions and other remarks, made it appear that appellee's peculiar corporate and financial dealings were proper because they were done for "tax purposes". The cross-examination was itself limited both in scope and in time. The Court constantly pressured appellants' counsel to stipulate facts, thus depriving the jury of the opportunity to observe appellee's demeanor. During appellee's cross-examination, his counsel frequently interrupted to make demands and "speeches" and offers to stipulate. On several occasions he made unethical remarks concerning the signature of Katleman. Those actions impeded greatly appellee's cross-examination and resulted in a denial of such right. The direct examination of Gerber was constantly interrupted by both the Court and appellee's counsel. The Court conducted extensive cross-examination of Gerber during the course of his direct examination. These actions on the part of the Court and appellee's counsel deprived appellants of a fair trial.



## ARGUMENT.

### I.

**Appellee Has No Standing to Bring This Action Because He Has Not Complied With the Nevada Fictitious Name Statute and He Is Estopped to Deny That La Nouvelle Eve Is a Corporation.**

The purpose of a fictitious name statute is to have a public record made of the individuals doing business under a fictitious name with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound. *Andrews v. Glick*, 272 Pac. 587 (Cal. 1928); *Hixon v. Boren*, 301 P. 2d 615 (Cal. 1956). It is to prevent fraudulent trading. *Ray v. American Photo Player Co.*, 189 Pac. 130 (Cal. 1920).

The doctrine of estoppel to deny corporate existence is based upon the principal of fairness, good faith and justice. *Casey v. Galli*, 94 U.S. 673, 680 (1877).

Before going into each of the above defenses, it is appropriate to examine into the nature of the dealings of appellee prior to the events here involved as well as those presented to this Court, because such examination will assist the Court in its consideration of the application of those defenses.

Despite the limitations on cross-examination into appellee's dealings during the years preceding the transactions here involved (See Appendix "A"), it is clear that appellee rarely dealt in his own name with respect to any matter in which there could be personal liability. He used other persons' names to form innumerable corporate entities to exploit the night club in Paris

and he would have such entities dissolve or go out of business when convenient to him. He controlled those entities through blank assignments from the persons to whom he gave money to purchase corporate stock.

Appellee has had tax problems in France since 1953 resulting from the operation of the club and its income and he has been in long litigation with the fiscal authorities. Appellee testified that the problems arose because "*The administration thinks that I am the owner.*" [T. 1382, line 5, to T. 1384, line 21]. Surely that is astounding testimony and most revealing. In the French court appellee takes the position he does not own La Nouvelle Eve. In the American Court he claims he owns La Nouvelle Eve.

It is interesting to note that in appellee's letter [Ex. 505], which apparently accompanied a January 16, 1959 letter to Jackie Bright [Ex. 504], he had Holmes append a postscript stating as follows:

"Mr. Bardy wishes me to include a point which I omitted in the second paragraph. Although he has always occupied the salaried position of artistic director, it must be remembered that during his stay there it has been exploited by several different societies.

"During those periods, his position has been that of director, licensed by the Ministry of Fine Arts, and his views have not necessarily reflected those of the society."

The second paragraph which the postscript referred to stated that American artists had worked for "me" at La Nouvelle Eve and appellee was very circumspect so as to make certain no one thought he was the owner.

The January 16th letter to Bright itself is most illuminating. It informs Bright that he expects difficul-

ties with Katleman upon his arrival in Las Vegas and that he had sent two signed contracts to Las Vegas, but no confirmation from the *Operator*<sup>6</sup> had been received and that later a contract signed by Katleman was received, which he signed in good faith upon assurances it was the same as the others, but that after he had it translated he discovered the main clause providing for an advance of \$15,000.00 was missing. None of the contracts he signed ever provided for such advance [Exs. 90, 90 A, D]. Nor is there any evidence that such advance was ever discussed or considered. This letter was sent on the heels of the Hotel advancing \$12,000.00 for transportation about a week before the troupe arrived on January 19th or 20th, because appellee had no money for such purpose. Nevertheless, the Hotel also advanced the \$15,000.00 [T. 2654, lines 4-22, Ex. Q].

As a result of appellee's tax problems, he is under some form of governmental arrete or interdit which prohibits him from exercising a commercial or industrial occupation. Even his driver's license has been withdrawn [T. 1382, line 9, to T. 1383, line 19; T. 1569, lines 14-25]. He may even be barred from access to French courts [T. 1385, lines 17-23].

Mansart's eviction of Nartella and its subtenant Societe Gerance de la Nouvelle Eve, even though he controlled all these corporations, indicates the sharp dealing of appellee. So, too, does the reopening of the club under Escarpolette and its subsequent dissolution.

The dissolution resolution adopted by Escarpolette stated it was unable to pay its rent to Mansart and it

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<sup>6</sup>The use of the word "Operator" by appellee is significant, because in the December 1, 1958 contract, as in the prior drafts, the contracting parties are "Operator" and "Artist", respectively, and in the drafts the "Artist" is either La Nouvelle Eve or La Nouvelle Eve Corporation [Exs. 90, 90A] and in the December 1st contract, La Nouvelle Eve Corporation [Ex. D].

was threatened with eviction by Mansart [Ex. 13]. The dissolution on December 1, 1958, was motivated, in all likelihood, by the contract to come to Las Vegas and was apparently a means to avoid payment of Escarpolette creditors, because at the time of its dissolution, Escarpolette "had no property and no assets" [T. 1452, lines 5-20]. Can there be any doubt as to the reason appellee controls Mansart through blank assignments?

Madame Deryckere testified that appellee used many societies to operate the club so he could cheat with his taxes and to have other people involved if there were trouble [T. 1781, lines 1-23].

Henchis testified that appellee always used different corporations and he always had to look to see what name was on a contract with appellee and that the girls in the Las Vegas show had contracts in the name of a Monte Carlo corporation [T. 2073, lines 10-25]. When appellee put on a show at the Brussels World's Fair in 1957 or 1958 and Henchis provided a line of girls, the show was a flop and four days after it opened appellee left and no one could find him and Henchis was not paid and had to pay his own girls [T. 2071, line 14, to T. 2072, line 20]. Appellee lives in furnished apartments and moves several times a year so that his creditors cannot reach him [T. 2077, lines 1-12].

The use of Madame Deryckere and Tanya Floria to obtain author's royalties demonstrates the sharp dealing of appellee. So does his letter to Holmes on March 31, 1959, instructing him to have Henriette Charmat, who was returning to Paris after April 7th "obtain a doctor's certificate stating she is sick. This could serve our purpose eventually" [Ex. I].

Truth appears to mean little to appellee. His testimony as to the various reasons he left Las Vegas immediate-



ly after a meeting was arranged requiring Katleman to come from New York shows how little regard he has for the truth. His testimony with respect to the use of the letters P.P. is revealing. At first he testified it meant for himself and for his artists and not indicating agency [T. 1471, line 14, to T. 1472, line 5]. When questioned by the Court he testified the letters meant nothing in French and as far as he was concerned it was an abbreviation for himself and he didn't know whether others in France used P.P. [T. 1474, line 5, to T. 1476, line 6]. He subsequently admitted he used the letters in front of his name when he signed for Escarpolette [T. 1480, lines 1-2]. Can there be any doubt but that he used P.P. in front of his name under the words La Nouvelle Eve Corporation on the December 1, 1958 contract [Ex. D] so that he would not be personally liable in the event of a suit on the contract?

Appellee is a litigious person, and while that fact may not in itself be a vice, it is some indication that appellee will seek to utilize every technicality possible. Beatrice Munson, one of appellee's witnesses, testified that though she had signed a contract for the Las Vegas show, she never received a copy, and after she returned to Paris, appellee commenced a proceeding against her on the ground of breach of that contract in not returning to Paris after April 7th, and after she paid him \$100.00 nothing further was done [T. 799, lines 10-20; T. 786, line 2, to T. 787, line 17]. He sued Henchis in France on May 26, 1959 [Ex. 337]. He sued MCA in France as early as May 6, 1959 in behalf of himself and of Escarpolette [Ex. 310].

The foregoing facts present a proper background for consideration of the fictitious name and estoppel to deny corporate existence defenses.



**A. Appellee's Action Is Barred by the  
Nevada Fictitious Name Statute.**

N.R.S. 602.010 provides as follows:

“Every person, firm and partnership conducting, carrying on or transacting business in this state under an assumed or fictitious name or designation which does not show the real name or names of the person or persons engaged or interested in such business, must file with the county clerk of each county in which the business is being carried on, or is intended to be carried on, a certificate containing the information required by NRS 602.020.”

N.R.S. 602.070 provides as follows:

“No action may be commenced or maintained by any person, firm or partnership mentioned in NRS 602.010, nor by his or their assignee, upon or on account of any contract made or transaction had under such fictitious or fanciful name or designation, nor upon or on account of any cause of action arising or growing out of the business so carried on under such name or designation, unless he or they, prior to commencement thereof, shall have filed the certificate required by this chapter.”

At the pre-trial conference the Court below indicated it would rule the statute inapplicable [Rep. Tr. of Pre-Trial Conference Proceedings 304]. Upon appellant's motion for a directed verdict based on the statute the Court ruled, as a matter of law, that appellee was not required to comply with the statute [T. 2738, lines 2-12]. Appellants contend that as a matter of law the statute is applicable and in any event a fact question was presented which should have been submitted to the jury.

It is admitted that appellee never filed a fictitious name certificate in accordance with the statute [R. 1827, lines 12-14].

The evidence reveals the following business activities with respect to the La Nouvelle Eve show in Las Vegas:

(1) Appellee hired MCA Artists Ltd. as his agent, which agent negotiated in Las Vegas, Nevada, with appellants El Rancho Hotel Operating Co. and Katleman to sell El Rancho Hotel Operating Co. the La Nouvelle Eve show [Ex. 449].

(2) In October 1958, appellee negotiated in Las Vegas with appellants El Rancho Hotel Operating Co. and Katleman with respect to a contract calling for the performance of the show in Las Vegas [T. 2417, line 6, to T. 2421, line 17].

(3) Thereafter, the show's agent MCA Artists Ltd., negotiated further in Las Vegas, with said appellants with respect to said contract [T. 2427, lines 12-24].

(4) The agent, MCA Artists Ltd., had an office in Las Vegas, Nevada, headed by appellant Gerber [T. 2352, line 22, to T. 2353, line 9].

(5) The December 1, 1958 contract was executed by appellee providing for ten weeks' performance, including option, in Las Vegas [Ex. D].

(6) Appellee hired Conner, a Las Vegas accountant, to handle the financial affairs of the show, including the collection of weekly checks for the show's performance and the paying of weekly show payrolls. Conner was told by appellee to use La Nouvelle Eve Corporation as the name of the business [T. 1819, line 18, to T. 1821, line 3].

(7) A bank account was opened in Las Vegas under the name La Nouvelle Eve Corporation and hundreds

of checks were drawn thereon for payroll, bills accumulated in Las Vegas, and to pay state and federal agencies, all as a result of the operation of the show in Las Vegas [T. 1837, line 4, to T. 1838, line 6; T. 1547, line 13, to T. 1548, line 18].

(8) With the knowledge of appellee, Harold Conner negotiated for La Nouvelle Eve Corporation with the Nevada Employment Security Department, the Nevada Industrial Commission, and the Treasury Department in connection with operations of the show in Las Vegas [T. 1838, lines 7-24; T. 1876, line 1, to T. 1880, line 1].

(9) As a result of such negotiations, money was paid in the form of La Nouvelle Eve Corporation checks, sent from Las Vegas, Nevada, to each of the said agencies [T. 1838, lines 7-24].

(10) The show hired two or three wardrobe women and a manikin in Las Vegas, Nevada, for the show in Las Vegas, Nevada [T. 2571, lines 1-18].

(11) A collective bargaining agreement was negotiated and entered into with AGVA in Las Vegas, Nevada, with respect to the personnel in the show under the name La Nouvelle Eve Corporation [Ex. 105].

(12) Appellee resided in Las Vegas, Nevada from about the middle of January, 1959 to March 6, 1959, for the purpose of supervising the show, and thereafter had representatives in Las Vegas, Peter Holmes and Regis Durieux, to take care of the show.

(13) At all times Gerber, of Las Vegas, was the show's representative in Las Vegas.

(14) Gerber attempted to sell the show to the Mapes Hotel in Reno, Nevada, to appear after it left the El Rancho [T. 2573, line 16, to T. 2574, line 21].

(15) Gerber also tried to sell the show to prospective purchasers in various cities in the United States outside the State of Nevada [T. 2483, lines 5-17].

(16) A new contract with El Rancho Hotel Operating Co., dated March 6, 1959, providing for eight additional weeks of performance of the show in Las Vegas, commencing April 8, 1959, was entered into in the name of La Nouvelle Eve Corporation [Ex. 472].

(17) Las Vegas attorneys were retained in connection with the show, said counsel testifying that he was retained by the management of La Nouvelle Eve Corporation [T. 1241, line 24, to T. 1242, line 7].

(18) Appellee negotiated with his artists with respect to contracts and extensions of contracts concerning services to be performed in the show in Las Vegas. Henchis testified those contracts were in the name of a Monte Carlo corporation [T. 2073, lines 11-25].

(19) In the summer of 1959 appellee spoke to Lou Walters, a Las Vegas producer, and had him try to sell the show to hotels in Las Vegas, Nevada [T. 949, line 12, to T. 951, line 19].

(20) Appellee's damage claims are predicated on inability to have the show presented in Las Vegas where other French shows appeared for long runs.

(21) At the time of the presentation of the show in Las Vegas, Appellee had no show or business elsewhere. As a matter of fact, there is no credible evidence that he personally ever had any business anywhere except that he was producer of shows at La Nouvelle Eve in Paris and the last production (Shocking) was put on in 1958 by Societe l'Escarpolette and that corporation was evicted because of non-payment of rent in December 1958.

(22) On April 24, 1959, La Nouvelle Eve Corporation wrote AGVA claiming \$14,000.00 held by AGVA for transportation [Ex. N].

The Nevada fictitious name statute gives no control to state authorities over the individual as does the usual



state statute which requires foreign corporations to qualify. Such statutes, in order to square with constitutional requirements, require the foreign corporation to "do business" within the state before coming into play. The Nevada statute does not use the words of art "doing business." In this regard it is interesting to note that in California, which requires a person "transacting business" under a fictitious name to file and publish a certificate (C.C. 2466) and where no action can be maintained by a person "doing business under a fictitious name . . . upon or on account of any contract made, or transactions had, under such fictitious name" (C.C. 2468) until a certificate is filed, it has been held that one contract only can constitute transacting business. *Ray v. American Photo Player Co.*, *supra*; *Moon v. Martin*, 197 Pac. 77, 78 (Cal. 1921).

The mentioned California statutes are different from Nevada's in that Nevada's is a jurisdictional statute which specifically enjoins *commencement* of an action where there has been no compliance. The strictness of the Nevada statute is further demonstrated by its preclusion of commencement of an action by an assignee (N.R.S. 602.070) and noncompliance is a misdemeanor (N.R.S. 602.070).

At the time of the pre-trial hearing the Court held that in its opinion N.R.S. 602.070 did not apply because the appellee was engaged in an isolated transaction and that the issue would not be submitted to the jury. Appellants contend that not only did the evidence demonstrate no isolated transaction and, in fact, rather considerable business done under a fictitious name as shown above, but even if either the contract of December 1, 1958 or the contract of March 6, 1959, extending the show for eight weeks, was the only contract involved, appellee would be precluded herein.



Although the many activities of the appellee under a fictitious name were more than sufficient to have required appellee, if he had been a foreign corporation, to have qualified in Nevada under the criterion laid down in foreign corporation "doing business" decisions, it is manifest that under Chapter 602 the making of a contract or having a single transaction under a fictitious name requires the filing of a certificate. If this were not true why would the legislature bar recovery "upon or on account of *any* contract made or transaction had under such fictitious name"?

Of import here is the fact that not only does Nevada preclude actions upon or on account of *any* contracts or transactions, it also precludes actions "upon or on account of any cause of action arising or growing out of the business so carried on under such name or designation." Thus, it is apparent that Nevada intended to preclude non-compliers from commencing not only actions on contracts or other transactions, but all actions having anything to do with the business carried on under the fictitious name.

This intention is demonstrated by the history of the statute. The first appearance in Nevada statutes of fictitious name certificates appears to be Statutes, 1887, 46, which required partnerships to file certificates. It barred partners doing business contrary to the statute from maintaining "any action upon, or on account of any contracts made or transactions had in the partnership name."

In 1923, the 1887 act was repealed and a new act, covering persons, firms and copartnerships was enacted (Stats. 1923, 271). Section 7 thereof provided that persons who did not comply would not "be allowed to commence, maintain or defend any action or proceeding . . . upon or on account of any contract made,

or transaction had, or liability incurred, under such fictitious or fanciful name or designation, *or cause of action arising or growing out of the business so carried on under such name.*" (Emphasis supplied). Section 7 was amended in 1925 (Stats. 1925, 44) so as to contain the language now contained in N.R.S. 602.070, which was the 1957 codification.

The reason for the insertion of the language added in 1923 is interesting in the light of *Reeves v. First Nat. Bank of Oakland*, 129 Pac. 800, 801 (Cal. 1912), in which damages were sought for failure of defendant bank to honor a check. The California Supreme Court held that the action sounded in tort and the failure to file a partnership fictitious certificate did not prevent its maintenance. Of interest is the language of the Court:

"... Besides, this suit did not grow out of any contract made or transaction had in plaintiffs' partnership name."

This language is significant in view of the language in the 1923 amendment, which came into being after the *Reeves* decision. It is plausible to conclude that the part of the amendment barring suits arising or growing out of the business carried on had some relation to the *Reeves* decision in the adjoining State of California. Whether or not it did, the language is clear and unequivocal, *Cf., Pendarvis v. U.S.*, 241 F. Supp. 8 (E.D. S.C. 1965), which held that negligent army medical treatment of a civilian after being assaulted by soldiers on maneuvers did not give rise to an action under the Federal Tort Claims Act because the Act excluded recovery for "any claim arising out of assault, battery, false imprisonment or arrest."

Language similar to N.R.S. 602.070 was involved in *Sanquin v. Wallace*, 234 P. 2d 394 (Okla. 1951), in

which the Oklahoma Supreme Court held that the statute prevented partners from recovering damages to the partnership as a result of an encroachment on the building used by the partnership.

No question appears to exist with respect to recovery by appellee under the contract of December 1, 1958. Clearly, N.R.S. 602.070 precludes recovery thereon. The conspiracy claim is also precluded. That claim arose or grew out of the business carried on by appellee under a fictitious name and particularly out of the extension contract of March 6, 1959. Under Nevada law, because of the clear language of N.R.S. 602.070, appellee's conspiracy claim is also barred.

The Court below ruled prior to trial that Chapter 602 did not apply because there was only an isolated transaction. As shown above, the transactions were not isolated ones and in any event suit upon even a single contract is barred. Cannot the present situation be analogized to that of a contractor who comes to Nevada to do a construction job? He hires some construction personnel in Nevada. He hires an accountant to handle all the company's financial records, including payroll. He hires a lawyer. He has an agent who seeks additional work in Nevada. Before his first construction contract expires, he enters into another. His accountant negotiates with state and federal authorities with respect to taxes payable by the contractor and his employees. He claims damages for loss of other Nevada contracting jobs. Could there be any question but that such a contractor transacts business within the meaning of Chapter 602? There is no real difference between that situation and the facts here present, except that the one here present is stronger for the reason that appellee had no business elsewhere. Whatever business there was in Paris belonged to corporate entities. Now, appellee claims rights as an individual proprietor. And if the facts

here do not, as a matter of law, preclude suit, it is submitted that a fact question was presented as to whether appellee was transacting business within Chapter 602, which question should have been submitted to the jury.

**B. Appellee Is Estopped to Deny That La Nouvelle Eve Corporation Is a Corporation.**

Courts have frequently ruled that if a person holds himself out as doing business as a corporation he is estopped to deny that such a corporation exists. The Supreme Court, in holding that the rule is premised on fairness and justice to the parties involved said:

“To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it.” *Casey v. Galli*, 94 U.S. 673, 680 (1877).

In *Close v. Glenwood Cemetery*, 107 U.S. 466 (1883), the Supreme Court held that an owner of land, who conducted business as a corporation and held the corporation out as the owner of land, was estopped to deny the existence of the corporation.

The California Supreme Court, in *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 192 Pac. 526, 527 (Cal. 1920), held that a business had “allowed itself to be held out as a corporation, and this is sufficient to estop it to deny the legality of its organization.”



In *Alco Finance Co. v. Moran*, 63 P. 2d 747 (Okla. 1936), it was held that by choosing a corporate name under which to transact its business, the purported corporation was estopped to deny its existence.

In *Tidd v. La Salle Industrial Finance Corporation*, 61 N.E. 2d 774 (Ill. 1945), the Court held that signers of a chattel mortgage who held themselves out as a corporation were estopped to deny corporate existence.

In *Mauritz v. Schwind*, 101 S.W. 2d 1085, 1092 (Tex. 1937), the court held that when an extension agreement, extending the time of payment of a note secured by a trust deed, was made in the name of a corporation, acting through a person as its president, the

“ . . . promoters, stockholders or members, and directors or other officers or agents of a corporation, who have participated either in its organization or in holding it out as a legally existing corporation will be individually estopped to deny its corporate existence as against . . . third persons who deal with it as a corporation. . . . ”

In *Taylor v. Aldridge*, 178 So. 331, 333 (Miss. 1938), the court held that a private person who conducts her business under a corporate name, and clothes herself with such indicia of corporate existence as possessing and using stationery bearing the corporate name and a bank account standing in the corporate name is estopped to deny the existence of the ostensible corporation “in the interest of plain justice” because:

“ . . . as between themselves, and so far as concerns their own private litigation and contestations, they [private persons] may by their agreements, their admissions, their representations, or their conduct estop themselves from denying the fact of



the existence of the corporation, so that for the purpose of such private litigations the business claiming to be a corporation, and a foreign corporation, may become such to all intents and purposes as much as though it were an actual corporation de jure."

In *Benton-Bauxite Housing Co-Op v. Benton Plumbing*, 310 S.W. 2d 483 (Ark. 1958), it was held that when a person signs a contract as president of a non-existent corporation, and accepts the benefit of such contract, he has held out the existence of such corporation and is consequently estopped to deny its existence.

In *Cavaness v. General Corporation*, 272 S.W. 2d 595, 599 (Tex. 1954) *aff'd on other grounds*, 283 S.W. 2d 33 (Tex. 1955), the Texas court had before it the precise question presented in the present action, the court holding that merely by entering into a contract in the name of a proposed but non-existent corporation, by signing the contract as a representative of such purported corporation, a person is estopped to deny the existence of such corporation, and may not, in his own name and for his sole individual benefit, maintain a suit and recover on the contract made with the defendant:

"In our opinion he cannot now claim the benefit of the contract personally since he, Cavaness, by signing the contract as President of the D-A-M Company, a corporation, is estopped and barred from denying the existence of the corporation."

Consequently, the court held:

". . . that appellant cannot recover in this proceeding for the reason . . . he, Cavaness, is estopped from personally denying in this suit the existence of the D-A-M Company as a legal corpora-

tion and from bringing this suit personally in his own name and for his own individual benefit.” (at p. 599).

The instant case is much stronger than any of the preceding cases. There can be no question but that appellee intended to contract in the name of La Nouvelle Eve Corporation. All contracts involved are executed for that entity. It was no accident that they were executed by such apparent entity. Appellee testified he intended to form such a corporation because of tax considerations. The corporate name appears above the signature “P.P. R. Bardy” on the prior drafts of the December 1, 1958 contract as well as the December 1st agreement. The March 6, 1959 contract is in the name of La Nouvelle Eve Corporation.

Appellee had stationery printed for the corporation which showed the principal office of the corporation as an address in Monaco. He entered into an agreement with Madame Deryckere using such stationery which had a government seal thereon for the purpose of giving validity to the document [Ex. 93]. He signed that agreement “Pour la Nouvelle Eve Corporation P.O. R. Bardy” [Ex. 93], indicating he was signing as an agent of the corporation. The agreement shows beyond peradventure that appellee intended that La Nouvelle Eve Corporation was the contracting party in the December 1, 1958 agreement.

Henchis testified that all the contracts appellee had with girls in the show were in the name of a Monte Carlo corporation [T. 2073, lines 11-25]. Appellee produced no contracts of any kind with his performers and it is a fair inference that they were with La Nouvelle Eve Corporation and on the same stationery as that of Madame Deryckere.

Appellee signed the collective bargaining agreement between AGVA and La Nouvelle Eve Corporation on January 15, 1959, "Pour La Nouvelle Eve Corporation P.O. R. Bardy" [Ex. 105].

He told Conner to open the bank account in the name of the Corporation and gave him the rubber corporate stamp which he had brought from Paris to use until checks could be printed with the corporate name. Appellee was a signatory on the corporate account and signed hundreds of checks which at first used the stamp and which were later printed.

The only evidence of any kind that appellee may not have wanted to maintain corporate status is a letter by him to Conner after receipt of letter from Conner dated March 2, 1959, in which Conner advised that Internal Revenue Service concurred that members of the show were not subject to income tax if they remained in the United States less than 183 days [Ex. M]. Appellee's undated answer (probably sent before he returned to Paris on March 6th) blamed AGVA for wanting a corporation to be the "Artist" in the contract with the Hotel [Ex. 157, see pp. 11-12, *supra*].

Aside from the fact that such accusation was wholly false, because the use of the corporation was, according to appellee's testimony, for tax purposes, his blaming of AGVA proves conclusively that appellee unequivocally intended to use La Nouvelle Eve Corporation as the contracting party. However, the rest of the letter left to Conner the decision as to whether or not to continue using La Nouvelle Eve Corporation [Ex. 157, see pp. 11-12, *supra*].

While such a letter to an accountant could hardly affect the facts as they existed prior to that time, it is significant that the March 6, 1959 contract, which

was signed by appellee the day he left for Paris, and after the reply to Conner, was in the corporate name and before he left he had Holmes' name put on the corporate account [T. 1547, line 23, to T. 1548, line 5].

And on April 24, 1959, he wrote AGVA attempting to get money deposited with it for transportation. The copy of the letter in evidence has as its closing "La Nouvelle Eve Corporation" [Ex. N].

Thereafter, appellee, on October 2, 1959, wrote Internal Revenue with respect to the corporation's activities at the Hotel [Ex. 378].

At all times, Conner kept the books and records in the corporate name [Exs. 513, 515, 516, 517, 522, 523, 524]. He negotiated with governmental agencies and filed tax returns in the corporate name [Ex. 378]. All checks paid to performers were corporate checks as were their withholding statements [Exs. 529, 530, 515].

All records maintained by MCA and AGVA were in the corporate name [Exs. 129, 518].

The receipt from Icelandic Airlines for the \$12,000.00 deposit advanced by the Hotel was in the corporate name [Ex. Q].

All checks paid by the Hotel were payable to the corporation [Ex. 516].

There exists no evidence that any transactions with respect to the show were carried on in any way except as La Nouvelle Eve Corporation. Under the above authorities appellee must be held estopped to deny that La Nouvelle Eve Corporation is a corporation.

There is another and important side to the estoppel doctrine. It also applies to parties who deal with the purported corporation. In other words a party who contracts with a purported corporation is estopped to deny that the corporation exists. That rule was expressed by



this Court in *Northwest Auto Co. v. Harmon*, 250 Fed. 832, 837 (9th Cir. 1918), as follows:

“The parties having contracted and dealt with each other as corporations, each is estopped to deny the corporate capacity of the other.”<sup>7</sup>

Fletcher, in *Cyclopedia of the Law of Private Corporations*, §3982, states the rule as follows:

“By the weight of authority, the rule that one who has contracted with an association as a corporation is estopped to deny its corporate existence applies so as to prevent him from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners. Having contracted with the association as a corporate body, he must sue the associates, if at all, as a corporation. . . .”

The effect of this is that if there was a suit arising out of the agreements in favor of the Hotel, it would have to be against La Nouvelle Eve Corporation and if appellee was sued individually, his defense would be that the Hotel is estopped to deny the corporate existence of La Nouvelle Eve Corporation and such defense would be valid.

If the defense of estoppel is not available in this suit, it means that appellee, by his actions, placed himself in the position whereby any breach on his part would have the Hotel without remedy because La Nouvelle Eve Corporation had no assets.

It is submitted that because of all the circumstances here present this Court should here invoke the estoppel doctrine, or at least hold that a fact question for jury submission existed. Any other holding would approve and invite fraudulent dealing.

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<sup>7</sup>*A fortiori*, any individual in either corporation must be estopped to deny the existence of that corporation.



II.

**Appellee was Not the Proper Party in Interest.**

**A. The Contracts Were Unambiguous With Respect to  
Who the Contracting Parties Were.**

Appellants moved for a directed verdict on the ground that appellee was not the proper party in interest and that indispensable parties were not joined, which motions were denied [T. 2738, line 24, to T. 2739, line 16]

The December 1, 1958 and March 6, 1959 contracts are absolutely unambiguous with respect to the contracting parties, La Nouvelle Eve Corporation and appellant El Ranco Hotel Operating Co. The contracts provide that they are the contracting parties and they executed the contracts. Under the Pre-Trial Conference Order the Court was supposed to rule if they were unambiguous, but did not do so [R. 1845, lines 4-11]. Clearly, appellee had no standing to sue on the basis of either contract. Manifestly appellee was not the proper party in interest as he was not a contracting party. *Cf., Northwest Auto Co. v. Harmon*, 250 Fed. 832, 836 (9th Cir. 1918). Not only can evidence not be admitted to go behind such contracts (*Mencher v. Weiss*, 114 N.E. 2d 177 (N.Y. 1953); *Birchcrest Building Company v. Plaskove*, 120 N.W. 2d 819 (Mich. 1963), but there was no such evidence. What evidence there may be in the record proves conclusively that appellee intended that La Nouvelle Eve Corporation be the contracting party, *i.e.*, the language of the contract between the corporation and Deryckere [Ex. 93]. Accordingly, appellants' motion for a directed verdict should have been granted.

**B. The Court Erred in Refusing to Instruct That There Was No Evidence That the Appellee Owned the Night-club in Paris.**

In the Court's instructions on the conspiracy claim, the jury was instructed that it could consider the claimed deprivation of appellee of performers in a show at appellee's night club in Paris [T. 3092, lines 5-12]. Appellants objected to the instruction and requested the Court to instruct that there was no evidence that the appellee had any night club. The Court refused to do so [T. 3215, line 25, to T. 3217, line 25]. This was prejudicial error.

As has been shown, the night club was owned by Mansart and always operated by a society tenant. Appellee testified he received income only in the form of author's royalties paid through dummies [T. 1434, lines 7-15; T. 1439, line 24, to T. 1440, line 13]. There was no evidence of any kind that appellee himself owned the club.

Laymen do not understand that corporations are separate persons and that even one hundred per cent stock ownership does not make the stockholder the owner. Accordingly, the instruction that the jury could consider the inability of appellee to reopen his night club and the refusal to instruct that appellee did not own the night club was prejudicial error.

III.

**The Admission Into Evidence of Assignments to Appellee Executed After Commencement of the Action Was Prejudicial Error.**

The Court admitted in evidence assignments to appellee from Miel, the liquidator of Escarpolette [Ex. 426], from Societe Cythere [Exs. 438, 439], the society which operated the night club after it was reopened in 1959 and which operated it at the time of trial [T.

1523, line 12, to T. 1524, line 5], from Francois and Guiol [Ex. 415] to whom the Escarpolette stock had been issued, and from Deryckere [Ex. 419], appellee's former wife, who claimed an interest in the show and that she was the author. Those assignments purportedly assigned to appellee all rights in Nouvelle Eve Corporation, La Nouvelle Eve, Paris, La Nouvelle Eve Show, L'Escarpolette and the name La Nouvelle Eve. They also purportedly assigned to appellee all rights to the claims against appellants. *All of the assignments were dated after the action was commenced.* Objection to their admission was made [T. 1646, lines 2-9].

Their admission was error for the following reasons:

1. An assignment made during the pendency of an action does not relate back to the time of commencement of the suit and an assignee under such an assignment cannot recover in such action. *Thelin v. Intermountain Lumber*, 80 Nev. 285; 392 P. 2d 626, 628 (1964). Such an assignment requires that the action be dismissed with prejudice. *Las Vegas Network, Inc. v. Shawcross and Associates*, 80 Nev. 405, 395 P. 2d 520 (1964).

2. A cause of action for fraud or similar tort cannot be assigned. *Prosky v. Clark*, 32 Nev. 441, 109 Pac. 793 (1910).

3. An assignment with respect to trade name infringement is invalid unless the good will of the business is also assigned. *George W. Luft v. Zande Cosmetic Co.*, 142 F. 2d 536 (2nd Cir. 1944).

The greatest vice of the admission of the assignments is that there is no way of knowing what effect the jury gave to the assignments, or any one of them.

For example, the jury might have believed that the cause of action for conspiracy belonged to Cythere, the society that was running the night club at the time

of trial, and because of the assignment awarded damages to appellee as the assignee. The jury may have believed that as Cythere was running the night club and using the name La Nouvelle Eve in conjunction therewith, it was entitled to damages for trade name infringement and upon the basis of the assignment, awarded damages to appellee. The jury may have believed that all claims belonged to La Nouvelle Eve Corporation, and not appellee, and because all of the assignments assigned all rights in that corporation to appellee, awarded damages to him as assignee. The jury may have believed that Madame Deryckere had author's or other rights with respect to the show and because of the assignment from her, awarded damages with respect thereto to appellee. The jury may have believed that Escarpolette had a claim because it had put on the Shocking show in 1958 which came to Las Vegas especially as it had sued MCA in Paris in 1959, and as a result of Miel's assignment awarded damages to appellee.

One can theorize endlessly over what possible effect any of the assignments had on the jury. While there is no precise way to determine whether any assignment was considered by the jury in arriving at its verdicts in whole or in part, the fact remains that they were offered in evidence by appellee for the very purpose of having the jury do what we are now theorizing the jury may have done.

The appellee offered the assignments because of his own machinations. Fearful that such actions could result in the jury finding he was not the real party in interest or that indispensable parties were not joined,<sup>8</sup>

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<sup>8</sup>Both issues existed under the Pre-Trial Conference Order [R. 1828, lines 30-32; R. 1829, lines 5-6; R. 1833, lines 24-26; R. 1834, lines 7-9].



he had the assignments prepared and executed during the pendency of this action and offered them at the trial. As demonstrated above they were clearly not admissible. It is submitted that appellee cannot now deny or belittle the consequences of admission of the assignments. Their admission requires reversal of the verdicts herein.

#### IV.

#### **Appellee Could Not Bring This Action Because He Had Not Arbitrated.**

Under the December 1, 1958 contract and the March 6, 1959 extension, La Nouvelle Eve Corporation was designated as the "Artist" [Ex. D, 472]. Paragraph 3 of the December 1 contract makes it a condition thereof that the "Artist" be a member of AGVA and that the Artist's obligations under the contract are subject to AGVA's Rules and Regulations, Constitution and By-Laws. The By-Laws require all members

"To refer all grievances for arbitration in accordance with the rules of AGVA and to abide by the decision of the arbitrators who are properly designated to arbitrate such grievances and not to sue in any court until and unless all remedies within AGVA are exhausted." [Gregory's Ex. A].

When Mazzei arrived in Las Vegas he stated that it was AGVA's position that the dispute could only be settled in arbitration [T. 2252, lines 9-12]. At the Pre-Trial Conference, the Court below ruled as a matter of law that the arbitration provisions did not apply [Rep. Tr. of Pre-Trial Conference, 299, line 19, to 220 line 16].

Whether appellee's causes of action are based on common law theories governed by Nevada law or on



some federal cause of action under the Lanham Act, he was bound by the agreement to arbitrate. (Cf. *N.R.S. §38.010 et seq.* and 9 U.S.C.A. §1 *et seq.*; *Robert Lawrence Co. v. Dovenshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959); *Ambassador G.M. v. Mollart*, 58 Nev. 329, 65 P. 2d 676 (1938); *United Assn. of Journeymen v. Stine*, 76 Nev. 189, 351 P. 2d 965 (1960)). Under both federal and Nevada law, a contract between two parties to submit all disputes to arbitration is valid and enforceable. (*Robert Lawrence Co. v. Dovenshire Fabrics, Inc.*, *supra*; *United Assn. of Journeymen v. Stine*, *supra*).

An agreement to arbitrate disputes may include tort as well as contract disputes. (*Robert Lawrence Co. v. Dovenshire Fabrics, Inc.*, *supra* (fraud); *Saucy Susan Products, Inc. v. Allied Oil English, Inc.*, 200 F. Supp. 724 (S.D.N.Y. 1961) (trademark infringement); *Almacenes Fernandez, S.A. v. Golodetz*, 148 F. 2d 625 (2d Cir. 1945) (conspiracy). The courts have expressed a liberal policy favoring arbitration. In the *Saucy Susan Products* case, *supra*, the court dealt with issues very similar to those existing in the present case, particularly trademark infringement and unfair competition under the Lanham Act, and held those issues subject to arbitration under

“the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration.” (200 F. Supp. 724, 727),

quoting with approval *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382 (2d Cir., *Cert. den.* 368 U.S. 817 (1961)).

Since the court properly ruled that there had been no waiver of the arbitration requirement [Rep. Tr. Pre-

Trial Proceeding 300, lines 15-16] and since the pertinent arbitration provisions of AGVA are at least as broad as those dealt with under the cases discussed above, the court erred as a matter of law in not staying the action as requested by appellants and submitting the issues to arbitration.

## V.

### The Court Erred in Refusing to Instruct That Evidence of the Alleged Conspiracy Had to Be Clear and Convincing.

The Court refused appellant's request to charge the jury that evidence of the conspiracy had to be at least "clear and convincing" [T. 2753, line 6, to T. 2754, line 8; T. 2807, line 16, to T. 2811, line 11] and instead, instructed that the quantum of proof required was only a clear preponderance [T. 3087, lines 1-3].<sup>9</sup> The Court's refusal was prejudicial error.

The vast majority of American courts, who have considered the question, are in agreement that proof of a civil conspiracy must be shown, *at least*, by clear and convincing evidence. A survey of recent cases reveals the near universality of the requirement that proof of conspiracy, regardless how the standard be labeled, must be by more than a preponderance.

In Illinois, the courts demand that proof of a civil conspiracy be "clear and convincing". *Bergeson v. Mullinix*, 78 N.E. 2d 297 (Ill. 1948). *National Steel & Cooper Pl. Co. v. Angel Research, Inc.*, 188 N.E. 2d 500 (Ill. 1963). Both the Oklahoma, *Holland v. Per-rault Brothers, Inc.*, 311 P. 2d 795 (Okla. 1957), and Missouri, *Fitzpatrick v. Federer Realty Company*, 351

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<sup>9</sup>No instruction was given as to the meaning of "clear preponderance".

S.W. 2d 673 (Mo. 1961), standards are likewise "clear and convincing".

The degree of proof in Michigan is "clear and satisfactory". *Harvey v. Lewis*, 98 N.W. 2d 599 (Mich. 1959), *rev'd on other grounds*, 114 N.W. 2d 214 (Mich. 1962).

The Wisconsin courts apply both the "clear and convincing" standard, *Roberts v. Saukville Canning Co.*, 26 N.W. 2d 145 (Wis. 1947), and a standard of proof "by clear and satisfactory evidence", or "by the clear and satisfactory evidence to a reasonable certainty", or "by clear, satisfactory and convincing evidence". *Cox v. Cox*, 48 N.W. 2d 508, 510 (Wis. 1951).

A higher degree of proof of a civil conspiracy is demanded in California, which requires that such evidence be "full, clear, and satisfactory." *Stevenson v. Stevenson*, 97 P. 2d 982 (Cal. 1940).

The "full, clear and satisfactory" standard likewise prevails in Texas, *Elick v. Schiller*, 235 S.W. 2d 494 (Tex. 1950), *rev'd on other grounds*, 240 S.W. 2d 997 (Tex. 1951); *Gager v. Reeves*, 235 S.W. 2d 688 (Tex. 1951), and in Pennsylvania, *Blank & Gottschall Co. v. First Nat. Bank*, 50 A. 2d 218 (Pa. 1947); *Fife v. Great Atlantic & Pacific Tea Co.*, 52 A. 2d 24 (Pa. 1947), and *Burkholder v. Westmoreland County Institution Dist.*, 68 A. 2d 436 (Pa. 1949).

A yet higher standard of proof appears to be demanded in Washington. Although the Washington courts once adhered to the "clear and convincing" standard, *Harrington v. Richeson*, 245 P. 2d 191 (Wash. 1952), more recent cases, state and federal, have required evidence of conspiracy to be "clear, cogent, and convincing". *Cheesman v. Sathre*, 273 P. 2d 500 (Wash. 1954), *Lewis Pacific Dairymen's Associa-*

*tion v. Turner*, 314 P. 2d 625 (Wash. 1957), *Robinson v. Stevens*, 249 F. 2d 731 (9th Cir. 1957), *Asheim v. Pigeon Hole Parking, Inc.*, 283 F. 2d 288 (9th Cir. 1960).

In the federal courts, proof of a civil conspiracy, in violation of the Sherman Anti-Trust Act, must be by the minimal standard—"clear and convincing". *United States v. Univis Lens Co.*, 88 F. Supp. 809 (S.D.N.Y. 1950).

Thus, regardless of the label used, the various American jurisdictions appear to be in complete agreement with the Washington court that the standards of proof of a civil conspiracy "unquestionably . . . mean something more than a preponderance of the evidence." *Cheesman v. Sathre*, 273 P. 2d 500, 502, *supra*.

The precise question before the Court in the present case was considered by the Washington Supreme Court in the *Cheesman* case. There the trial court instructed the jury that the alleged conspiracy could be proven by a preponderance of the evidence, and refused to instruct the jury that the plaintiff must prove the existence of the conspiracy by the Washington standard, evidence that is "clear, cogent, and convincing". The court held that it was prejudicial error not to give the requested instruction and on that ground granted a new trial.

Accordingly, in the present case, the Court committed prejudicial error by instructing the jury that the evidence of the alleged conspiracy among the various defendants need only be by a clear preponderance, and by refusing to instruct the jury that plaintiff had the burden of proving the existence of the alleged conspiracy by the proper standard of evidence—clear and convincing.



VI.

**The Verdict Against El Rancho Hotel Operating Co.  
for Breach of the December 1, 1958 Contract in  
the Amount of \$27,201.00, Reduced by Re-  
mittitur to \$24,300.66, Is Not Supported by Any  
Evidence.**

In his amended complaint appellee alleged appellant El Rancho Hotel Operating Co. was indebted to him under the contract of December 1, 1958 in the sum of "approximately \$17,237.61" [R. 145, lines 12-15]. The jury's verdict was \$27,281.00. A remittitur reduced this to \$24,300.66 [R. 2226, 2227].

Aside from other grounds raised herein by appellants, it is manifest that there is no competent evidence to support the verdict on this claim and all evidence on the issue demonstrates that nothing was owed to anyone on the December 1, 1958 contract [Ex. D].

Although the Pre-Trial Conference Order set forth as issues of fact the question of performance under the contract and whether any money was owed to appellee under the contract [R. 1828, lines 16-21] the only oral evidence offered by appellee on the issues is as follows:

"The Court: Let's not take the time for this. I will ask him the question.

Mr. Bardy, did you do everything that you were called upon to do under your contracts with the El Rancho Vegas Hotel in connection with the La Nouvelle Eve Show?

Mr. Lionel: If the Court please, defendants would respectfully object to the question on the ground that no sufficient foundation has been laid, and on the further ground it calls for a conclusion of the witness.

The Court: You are entitled to object, and I will overrule the objection, in the interest of saving time, and you may cross-examine fully on it.



Did you perform everything you were supposed to perform or called upon to perform under your contracts with the El Rancho Vegas Hotel?

Mr. Lionel: If the Court pleases, I would like to make a further objection, respectfully, that is that there are no contracts between the plaintiff and the El Rancho Vegas Hotel or any corporations.

The Court: Yes, I understand that to be your objection throughout, and that will be overruled.

Mr. Galane: May I ask a question, your Honor?

The Court: Very well.

Mr. Galane: May I, sir, please ask Mr. Bardy?  
By Mr. Galane:

Q. Mr. Bardy, did you perform all contracts between you and the El Rancho Vegas Hotel?

The Interpreter: Could I have the question repeated, please?

By Mr. Galane:

Q. Mr. Bardy, did you perform all contracts between you and the El Rancho Vegas Hotel?

Mr. Lionel: Before the witness answers, may the record show the same objection?

The Court: Yes. The objection will be deemed made, and the record will show clearly that you object, all of you, all defendants—

The Witness: Yes.

The Court: —to these questions as to performance.

Mr. Galane: Would the record now show the answer of the interpreter as to what Mr. Bardy stated in response to my question?

The Witness: Yes.

By Mr. Galane:

Q. Were you paid in full under the contract dated December 1, 1958?

Mr. Lionel: To which the defendants will object on the same grounds as indicated before and, particularly no foundation.

The Court: Very well.

Mr. Galane: Shall I repeat the question in view of counsel's objection?

The Court: The objection will be overruled. As to these questions as to performance, unless you want to repeat it, the record may be deemed to show that you made the same objection.

Mr. Lionel: Yes, your Honor.

The Court: And the same ruling upon all this line of questions as to performance and payment.

Mr. Galane: In view of the colloquy, may I repeat the question, your Honor?

The Court: Yes.

By Mr. Galane:

Q. Were you paid in full under the contract dated December 1, 1958, between you and El Rancho Vegas? A. He hasn't been paid completely.

Q. How much is owed you under the contract of December 1, 1958, between you and El Rancho Vegas?

Mr. Lionel: If the Court please, I must enter another objection, and this goes to the whole line of questioning; that is, it assumes facts not in evidence; namely, that Plaintiff's Exhibit 90 and 90A are contracts dated December 1, 1958.<sup>10</sup>

The Court: Very well. That objection may be added, and it is overruled.

Mr. Galane: May I repeat the question?

The Court: Did the witness say he had been paid in full?

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<sup>10</sup>Exs. 90 and 90A were dated November 25, 1958. Only Ex. D is dated December 1, 1958, and was not admitted in evidence until later in the trial.

Mr. Galane: No, sir.

(Record read.)

The Court: Has not; is that it?

The Interpreter: That is correct.

The Court: Would the Reporter note the answer just given by the Reporter? The Reporter takes down everything that is said in the courtroom. I tell every reporter to take down everything that is said in the courtroom during the session of the court, and even if I say 'Don't take it down,' just take that down, too. That is his official duty.

By Mr. Galane:

Q. Mr. Bardy, how much is owed you? A. About \$18,600.

The Court: Is that the contract of December 1, 1958?

Mr. Galane: That is correct, sir.

The Court: Is that what he understood?

By Mr. Galane:

Q. Did you understand by your last answer that you were referring to the December 1, 1958, contract? A. Yes, the first contract.

The Court: And the figure given was what? (Record read.)

The Court: \$18,600, which the plaintiff says is unpaid under the first contract.

Mr. Lionel: May I have that full answer read back again, please?

(Record read.)

Mr. Galane: Shall I continue questioning?

The Court: About \$18,600.

The Interpreter: About, yes.

The Court: Is it more or less, or can we have the exact figure?

The Witness: It can be more; it can be less.

It can be plus; it can be less. The account must be made at the end of the contract.

By Mr. Galane:

Q. Mr. Bardy, explain what you mean that the account was to be made at the end of the contract. A. The artists were paid by the accountant. It was reimbursed every week, \$2,000 advance by Mr. Katleman. It was given to me personally, \$5,000 every week. I buy the seamstress some fixings to keep up the dresses. The bills were presented to the accountant, and this is for this reason, and this is when we should have the account to be made at the end of the contract.

Q. When did you leave Las Vegas for Paris?

A. 6th of March, 1959.

Q. Before you left Las Vegas for Paris, were you ever presented with any bill by El Rancho Vegas Hotel? A. Never." [T. 1267, line 4, to T. 1272, line 13].

Surely this testimony was not admissible for any purpose. It consisted of inadmissible conclusions (See 32 C.J.S. §453, Evidence, pp. 93, 94) made by a person not qualified in any respect to even testify concerning any of the facts underlying the inadmissible conclusions.

The December 1, 1958 contract covered performance through April 7, 1959, a month after appellee returned to Paris. Payments under the contract were not made to appellee, but to Conner, the accountant for La Nouvelle Eve Corporation [T. 1551, line 22, to T. 1553, line 13]. Conner received the weekly checks from either Peter Holmes or the wardrobe mistress and deposited them in the bank account of La Nouvelle Eve Corporation [T. 1842, lines 8-20].

According to Conner, the cash receipt journal of La Nouvelle Eve Corporation (Exhibit 513L) in which he



posted the weekly checks, the total received through April 7, 1959, was \$150,000.00 [T. 1842, line 18, to T. 1843, line 21]. That sum represents the total amount provided for by the December 1, 1958 contract—ten weeks at \$15,000.00 per week.

Furthermore, appellee testified on cross-examination that in arriving at the approximately \$18,600 figure, he did not give credit for the \$10,000.00 paid by the hotel to AGVA for the return transportation of the troupe which was an obligation of the artist under the contract [T. 1562, lines 11-22]. And although the Court commented on this fact several times and appellee's counsel represented on several occasions that he would show appellee also paid some portion of the return transportation, he never did do so [T. 2139, line 6, to T. 2440, line 25; T. 2451, line 1, to T. 2452, line 10]. On one occasion, with respect to the credit for the return transportation, the Court said:

“Can't we find out exactly? You aren't going to ask this jury to render a verdict for approximately so much money. I can't render a judgment for approximately so much money; have to be a definite amount.”<sup>11</sup> [T. 2453, lines 10-13].

The foregoing demonstrates that there is no competent evidence to support a verdict for alleged breach of the December 1, 1958 contract. In Nevada, “to justify a money judgment the amount as well as the fact of damage, must be proved . . . there must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture . . .” *Alper v. Stillings*, 80 Nev. 84, 389

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<sup>11</sup>The jury could well have inferred from the foregoing statement of the Court that the Court felt appellee was entitled to a verdict and the only question involved was the amount thereof. In this regard, see page 78 *infra*, where appellants requested a mistrial on the ground that by the remarks of the Court the burden of proof had shifted to the appellants.



P. 2d 239, 240 (1964). *Peterson v. Wiesner*, 62 Nev. 184, 206, 146 P. 2d 789 (1956).

Testimony from a party, who did not receive the weekly checks, who did not take care of the books of account, who was not even in the United States during a portion of the period involved, that he was owed "about \$18,600," but that "it can be more; it can be less. It can be plus; it can be less," cannot by itself support a verdict, particularly when the books of account show that all sums provided for by the contract were received. As far as performance is concerned, no evidence other than appellee's conclusion is in the record.

How the jury arrived at a verdict of \$27,281.00 is a mystery. The difference between "about \$18,600" and that amount can hardly be attributed to an error in computation of interest. Rather, it is indicative of the influence of passion and prejudice against appellants. Regardless of amount, there exists no basis whatsoever for a judgment against appellant Hotel El Rancho Operating Co. for breach of the December 1, 1958 contract.

## VII.

### **The Conspiracy Verdict Is Not Supported by Any Evidence.**

#### **A. Under Nevada Law There Can Be No Recovery of Damages Without Proof of Damages and Speculation or Conjecture Will Not Support an Award of Damages.**

It is indeed difficult to understand how the jury arrived at its huge conspiracy verdict. No valid evidence exists to support it. At the outset it should be pointed out that appellee *never* introduced any evidence to show what he ever earned. Whether such failure was due to his manipulations for tax purposes or otherwise is unknown, but nevertheless there was no such evi-

dence. This fact prompted the Court below to remark as follows:

“... the plaintiff never offered any evidence as to what he made in the club over there, and he never offered any evidence as to whether he had any profit in his run here or not.” [T. 2862, lines 17-20].

Under Nevada law it is crystal clear that under such circumstances there can be no recovery.

In *Alper v. Stillings*, 80 Nev. 84, 86, 389 P. 2d 239, 240 (1964), the Nevada Supreme Court reversed a \$10,000.00 jury verdict awarded to the owners of a bar who had sued their landlord for a breach of his covenant of quiet enjoyment. In reversing, because of the failure of proof of damages, the Court said:

“It is established law in this state, as in most jurisdictions, that to justify a money judgment the amount, as well as the fact of damage, must be proved; that there must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture; that to prove a right to damages without proving the amount, entitles a plaintiff to nominal damages only. *Peterson v. Wiesner*, 62 Nev. 184, 206, 146 P. 2d 789.”

In another recent Nevada case, *Knier v. Azores Construction Co.*, 78 Nev. 20, 23, 368 P. 2d 673, 675 (1962), a motel sought damages from a contractor based on delay in moving and rehabilitating a motel. In reversing an award of damages because there had been no established business having a history of profit for such a length of time as to make the loss of profit reasonably ascertainable, the Court said:

“The Stage Coach Motel at its new location was a new business venture. Admittedly, it had been operative one-half mile away from 1953 to the fall

of 1955 when it closed. The record before us is silent as to why it closed. Nor does it reveal whether the motel at its original location ever enjoyed a profit. Hence, the fact that it had been an operating motel two years before at a nearby location, under the circumstances of this case, is of no assistance to Azores and Brunzell in their attempt to establish a claim for loss of profits.

“In *Dieffenbach v. McIntyre*, 208 Okl. 163, 166, 254 P.2d 346, 349, it was said ‘While it is true that we have in numerous cases held that the loss of profits in an established business is a proper element of damages, the business of plaintiff in her former uptown location could not be used, we think, to measure the damages sustained by her, because of her removal from the buildings of defendant. She occupied the buildings of defendant only two months, and that in our opinion was not a sufficient length of time to constitute her business there an established business.’ Where the loss of anticipated profits is claimed as an element of damages, the business claimed to have been interrupted must be an established one and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable. See anno. 1 A.L.R. 156; 99 A.L.R. 938.

“The rule against the recovery of uncertain damages generally is directed against uncertainty as to the existence or cause of damage rather than as to measure or extent. *Brown v. Lindsay*, 68 Nev. 196, 205, 228 P.2d 262, 266. We hold that the claimed existence of damage, that is, the loss of prospective profits, of The Stage Coach Motel, a new business enterprise, is too uncertain and speculative to form a basis for recovery.”

Those Nevada decisions apply flatly to the case at bar, because there exists no proof of properly ascertainable damages and the verdict must of necessity have resulted from pure speculation or conjecture.

**B. Because Appellee Could Have no More Than a Naked Claim for Unfair Competition, the Court Erred in Instructing the Jury on the Issue of Damages With Respect to Trade Name Infringement Under the Lanham Act.**

Appellant moved for a directed verdict with respect to appellee's claim under the Lanham Act on the ground that a naked claim of unfair competition did not come under the Lanham Act<sup>12</sup> [T. 2737, lines 13-22]. The motion was denied [T. 2738, line 2] and the jury was instructed that on the conspiracy issue it could consider damages suffered by reason of injury to the reputation of the trade name La Nouvelle Eve by reason of the La Nue Eve show at the Hotel from July 29, 1959 to October 21, 1959, and by reason of confusion as to the source of production in violation of appellee's rights as owner of such trade name [T. 3095, line 17, to T. 3097, line 7].

The denial of the motion and the instruction were error because the Lanham Act afforded no protection to the name "La Nouvelle Eve" because it was neither a trade name nor a registered trade mark. In *Shaffer v. Coty, Inc.*, 183 F. Supp. 662, 664 (S.D. Cal. 1960), it was held that the Lanham Act did not provide a federal remedy for acts of unfair competition which did not involve the infringement of a federally registered trade mark or an unregistered trade name and that such a claim was merely a "naked" claim for unfair competition.

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<sup>12</sup>Appellee elected to proceed under the Lanham Act and not under the common law of unfair competition [Tr. 2794, lines 2-15].



“ . . . that Act does not confer upon the Federal courts jurisdiction over ‘naked’ claims for unfair competition, or over claims for infringement of un-registered marks.”

It is clear that a trade mark identifies a product or a vendable commodity while a trade name identifies and distinguishes a business and its good will. *In re Lyn-dale Farms* (C.C.P.A. 1951), 186 F. 2d 723; *Ameri-can Steel Foundries v. Robertson*, 269 U.S. 372 (1926); *Standard Oil Company v. Standard Oil Com-pany*, 252 F. 2d 65 (10th Cir. 1958). “La Nouvelle Eve” does not identify any product or vendible commodi-ty. Thus, the question presented is whether it is a trade name and identifies a business and its good will. If it does not, it is not protected by the Act.

Appellee testified that “La Nouvelle Eve” is a title which was first used in 1950 [T. 1058, lines 19-23] and that since then the title was used on a neon sign on the building where the night club was located in Paris. It was lit up every night except when the club was closed [T. 1061, lines 8-20; T. 1062, line 24, to T. 1063, line 7]. Appellee testified there never was any show called La Nouvelle Eve [T. 1094, lines 1-4]. Thus, based on appellee’s own testimony “La Nouvelle Eve” did not identify any business. Actually it was only the name of a night club in Paris. A night club owned by Mansart and leased, and in some cases in turn sub-leased, to societies which operated the night club. It is undisputed that it identifies no business and the good will of such business. No society who ran the business prior to 1959 had any good will either, because each of them failed as businesses. Under such circumstances, it was not protected by the Lanham Act and the denial of the motion and the damage instruction given was there-fore prejudicial error.



**C. The Misconduct of Appellee's Counsel in Apprising the Jury of the Tax Consequences of a Verdict in Favor of Appellee, Was a Cause of the Monstrous Verdict.**

At various times during the trial, the Court admonished appellee's counsel not to make speeches, but just to state his objections (See Appendix A). Nevertheless, during summation of counsel for appellants MCA and Gerber the following occurred:

"Mr. Foley: . . . There has been enough colloquy between counsel during the case. You have heard enough of that. But bear in mind these people talk about the Bible and then talk about big money. They want to penalize us. They want this Nevada jury to give Bardy money that won't even be taxed in the United States to take back to France to show the world that we are not putting up—

"Mr. Galane: If your Honor please, I move that be stricken, and ask the Court to instruct the jury everything recovered by Mr. Bardy is taxable in full by the United States Government upon that source of income. It was an improper statement, and I ask it be clarified. Everything is taxable as ordinary income, even the punitive damages, under the rulings of the United States Courts, and that is my advice to Rene Bardy, as his American counsel, at the full taxable rate of income."

The foregoing obviously deliberate statement of appellee's counsel was prejudicial. Not only was it made in violation of the prior admonitions of the Court, but there was no possible way to have removed its prejudicial effect from the minds of the jurors. It is well settled that it is improper for counsel to apprise a jury of the tax consequences of an award. *Pfister v. City of Cleveland*, 113 N.E. 2d 366 (Ohio, 1953); *Wagner v. Illinois Central Railroad*, 129 N.E. 2d 771 (Ill. 1955);

*Highshew v. Kushto*, 134 N.E. 2d 555 (Ind. 1956); *Bracy v. Great Northern Railway Company*, 343 P. 2d 848 (Mont. 1959). The purpose of the remarks of appellee's counsel is all too obvious. The jurors could well have felt that even if appellee himself was not entitled to a large award, most of the money would go to the government. Or, the jurors could have felt that because the award was taxable they should increase it so that appellee would net sufficient money after taxes to compensate him for any damages they felt he may have sustained. In either event the jury should not have been subjected to the statement of appellee's counsel and particularly at the time it was made.

Even if appellee should argue that MCA's counsel provoked an objection at that point, that does not excuse the "speech." The Hotel's counsel was not involved, but was powerless to do anything about it. The statement must surely have had an effect upon the jury adverse to appellant Hotel.

### VIII.

#### **The Hotel and Katleman Are Not Liable for Conspiracy.**

Because of space limitations, the argument by co-appellants MCA and Gerber on the conspiracy issue, on both the law and the facts, is adopted by appellants Katleman and the Hotel. However, on one phase thereof argument is here made.

The conspiracy claim, when reduced to its essence, is in reality predicated on what happened on the night of April 8, 1959, and immediately prior thereto. The subsequent events are ingeniously grafted thereon by ap-

appellee's counsel, but as co-appellants' brief demonstrates, there exists no evidence to support the contentions of appellee that they resulted from any conspiracy.

Putting aside for the moment all other defenses raised by appellants, in reality there exists at best a case involving a question of breach of contract only. In other words, did the Hotel breach the March 6, 1959 contract with La Nouvelle Eve Corporation by not permitting the show to perform on April 8, 1959? Even if we assume that the Hotel was in some way privy to Morrison and Caire being in Los Angeles on that night so as to support its position that there was a breach, because the leading performers were not present ready to perform, such acts only would prevent the Hotel from claiming a breach of contract on the ground of their absence and render the Hotel liable for damages for breach of contract. Restatement of the Law of Contracts, Sec. 315. Numerous decisions hold that parties to a contract are not liable for conspiracy to breach the contract. *Eidelberg v. Newman*, 206 N.Y.S. 2d 205 (1960); *Shulman v. Royal Industrial Bank*, 113 N.Y.S. 2d 489 (1952); *Hein v. Chrysler Corp.*, 277 P. 2d 708 (Wash. 1954); *Allison v. American Airlines*, 112 F. Supp. 37 (D. Okla. 1953).

Furthermore, the evidence is overwhelming that Morrison had no contract with Henchis after April 7, 1959, and was returning to London, and Caire had no contract and was not going to perform after April 7th unless she received a contract and a raise. Appellee was fully aware of this situation, but did absolutely nothing to alleviate it. His answer, before leaving for

Paris on March 6th was that it would be taken care of, but it never was [T. 335, lines 16-23]. Under such circumstances appellee is in no position to blame appellants for preventing the appearance of Morrison and Caire, especially as he had promised their performance and, in effect, contracts with them prior to the execution of the March 6, 1959 agreement [Exs. 472, 469].

What happened here was in reality a game of poker played by appellee. He left Las Vegas immediately after making an appointment to discuss the extension with Katleman requiring Katleman to fly from New York to Las Vegas. He knew that the Hotel needed a show in order to do business. Appellee was aware that if he did not sign up Morrison and Caire and did not replace the manikins as he had promised, there existed the possibility that the show would not go on on April 8th. In his letter to Holmes dated March 31st, he wrote with respect to Katleman, “. . . I don't believe in his bluff.” [Ex. 217]. Appellee played his cards to the hilt. He felt that the Hotel would either have to permit the show to go on or he would litigate. He was supposed to be in Las Vegas on April 6th. He did not appear, but instead devoted his energies to preparing for litigation, including preparation of false evidence, such as his request to Holmes to obtain a false doctor's certificate that Henriette Charmat was ill [Ex. I]. He refused to speak to Stein in Paris. He refused to telephone Durieux [Ex. 220]. He kept Gerber in the dark. After authorizing a new deal with an abbreviated show, he reneged. In this suit he has won his poker game and a pot far beyond his expectations. It is submitted that a conspiracy connotes a situation completely unlike that here present and appellants Hotel and Katleman were not liable for any conspiracy.



IX.

**The Court's Conduct in Permitting Appellee to Testify Without Foundation to Broad Conclusions, the Constant Interruption of the Cross-Examination of the Appellee and the Limitation of Such Cross-Examination and the Court's Impatience With Respect Thereto, the Constant Interruption of Gerber's Direct Testimony and His Cross-Examination During Such Direct Testimony and the Misconduct of Appellee's Counsel Deprived Appellants of a Fair Trial.**

In Point VI, *supra*, there is set forth a portion of appellee's direct examination. There the Court permitted appellee to testify to broad conclusions with respect to both performance and payment. As there shown there was no foundation laid for the testimony permitted over objection of appellants' counsel. The reason given for the Court's conduct was that "it was in the interest of time." It is submitted that the reason given does not justify what occurred, particularly in a case in which the jury verdicts exceeded one half million dollars.

On other occasions the Court permitted appellee to testify on direct examination to leading questions on important issues propounded by the Court itself, *i.e.*,

"The Court: Did you ever give the Hotel or anyone permission to use the name of the show, the costumes, or any of the people in it, or any of the production numbers, or any of the property in connection with the show, after April 8, 1959?

The Witness: Yes.

The Court: Whom did you give permission to?

The Witness: To Mr. Katleman after he had signed the additive to the contract.



The Court: But after the show was prevented from going on stage on April 8, 1959—

Mr. Lionel: May the record show that the defendants respectfully would object to the question by your Honor at this time?

The Court: Yes. State your grounds of your objection.

Mr. Lionel: On the ground that the witness has answered the question; on the further ground that it is leading and suggestive and calling for the conclusion of the witness.

Mr. Galane: I think with a foreign witness, to suggest he has answered the question—

The Court: I didn't ask for any comments. Overruled.

After the show was prevented from going on stage on April 8, 1959, did you give anyone such permission?

The Witness: No." [T. 1312, line 13. to T. 1313, line 11].

Following the Court session at which the above questioning occurred and which was during the same session as the testimony with respect to performance and payment were given (Point VI, *supra*), appellants' counsel moved for a mistrial on the ground that "by permitting the plaintiff himself to testify to broad conclusions of fact and, particularly, broad conclusions placed by the Court, . . . the jury may have a feeling that in the mind of the Court there is no question but what the plaintiff has a case and has proved his case . . . [and] by permitting the plaintiff to testify in this manner, the burden of proof has, in fact, shifted to the defendants to disprove that the plaintiff did not have damages, and certain other things, which are clearly in issue under the pretrial order." [T. 1340, line 14, to T. 1341, line 1]. The motion was denied [T. 1341, line 17].

Appellants' contend that the Motion was well taken and should have been granted.

Appendix "A" hereto contains portions of appellant's cross-examination of appellee. Appellee testified in French and an interpreter was used. Such cross-examination is difficult under normal circumstances. Here by reason of the constant unwarranted interruption of the cross-examination by the Court and appellee's counsel, effective cross-examination of appellee was impossible and resulted in a denial of the right of cross-examination.

In Appendix "A" appellants have set forth their characterization of the action of the Court and appellee's counsel. Appellants submit that the characterizations are correct and that the Court unwarrantedly constantly interrupted the cross-examination, took control of the cross-examination on numerous occasions, belittled counsel for many of the questions asked, charged counsel with being unfair to the witness, in effect advise the jury that appellee had not been discredited and placed the cloak of legality on appellee's peculiar financial and corporate dealings by making it appear that "tax purposes" was justification therefor. The constant pressuring of counsel to complete cross-examination within specific limitations of time and refusing time requested prevented proper cross-examination. The constant request that appellants' counsel stipulate to facts was clearly improper. Surely a party has the right to elicit facts from an adverse party on cross-examination and to have the jury observe the demeanor of the party as well as hear the testimony. The credibility of appellee was one of the most vital matters for jury determination. Counsel has the right to determine what evidence he will elicit from the adverse party on cross-examination and what evidence he will elicit from

his own witnesses. The comments of the Court as to whether Katleman was going to testify and why the Hotel could not itself prove certain things were unjustified and improper. So too were objections voluntarily made by the Court to cross-examination questions.

The actions of appellee's counsel in constantly interrupting the cross-examination to make demands and "speeches" were most harassing and also improper. The constant offers to stipulate were improper and impeded the cross-examination. Except for several occasions where the Court admonished appellee's counsel not to make "speeches" his conduct was condoned by the Court and practically invited. The repetitive remarks about Katleman's signature were not only disruptive, they were deliberate, and unethical. The actions of the Court and counsel resulted in a denial of the right of cross-examination.

Attached as Appendix "B" are portions of the direct examination of appellant Gerber. No characterizations are included. The appendix is included for the purpose of showing the constant interruption by the Court of such direct examination, the frequent cross-examination by the Court during such direct examination and the constant interruption by appellee's counsel particularly with his constant offers to stipulate, which were most disruptive and impeded Gerber's direct examination. The only specific portion to which attention is called is the following:

"Q. He told you he, a man, was going to sign. 'Oh, My Man I Love You So'?"

The Witness: He didn't say that; he said he was going to sing her numbers. That was one of her numbers.

The Court: Do you want the jury to understand he was going to sing 'Oh, My Man, I Love You So'?" [T. 2517, lines 9-14].

The jury could well have inferred that the Court did not believe Gerber.<sup>13</sup>

The continual interrogation by the Court of Gerber during his direct examination was prejudicial, especially in the light of appellee's counsel's remark before the jury at the commencement of Gerber's examination that "I want the record to show—I say this respectfully—credibility is a major issue on Mr. Roy Gerber." [T. 2350, lines 15-17].<sup>14</sup>

The Court recognized that it had unduly pressured counsel to hurry the trial and advised counsel in chambers that he had put pressure on counsel, because there was pressure on him because another judge had to use the courtroom [T. 1895, lines 2-24]. It is submitted that such reason does not justify the pressure exerted on counsel, especially when the case was tried 450 miles away from Las Vegas, on short notice, and where none of the counsel, parties or witnesses resided.

While it is true that reversible error predicated on conduct of a Court of the nature here involved is *sui generis*, language used by appellate courts in reversing judgments because of judicial conduct during trial is useful.

"No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Be-

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<sup>13</sup>Holmes himself testified that he offered to do Caire's part on April 7th including singing her songs [T. 279, lines 3-14].

<sup>14</sup>Remarks by appellee's counsel of such nature were not unusual, *i.e.*, during his cross-examination of Katleman, he said, "May I read this testimony to the jury? It is eight lines and rather crucial, in view of what Mr. Katleman just testified to." [T. 2697, lines 15-17].



cause of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other." *Western Coal & Mining Co. v. Kranc*, 100 S.W. 2d 676, 677 (Ark. 1937). ". . . we have concluded that plaintiff's were deprived of a fair trial and an unprejudiced consideration of the case by the jury because of Trial Judge's repeated lengthy cross-examination of plaintiffs' witnesses, constant interruptions of answers of witnesses and unnecessary criticisms of plaintiffs' counsel; and because the judge so far injected himself into the proceedings that the jury could not review the case in the calm and untrammelled spirit necessary to effect justice." *Kamen Soap Products Co., Inc. v. Prusanky & Prusanky, Inc.*, 201 N.Y.S. 2d 875, 876 (1960).

". . . The responsibility of striving for an atmosphere of impartiality during the course of a trial rests upon the trial judge. His conduct in trying a case must be fair to both sides, and he should refrain from remarks which might injure either of the parties to the litigation. Since the judge's duties are of a judicial nature, he should not act as counsel for a party by raising objections which the party should make." *Hansen v. St. Paul City Ry. Co.*, 43 N.W. 2d 260, 264 (Minn. 1950).



In *La Chase v. Sanders*, 111 A. 2d 690, 692 (Conn. 1955), the Court quoted from *Commonwealth v. Myma*, 123 Atl. 486, 487 (Pa. 1924) as follows:

“The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality. An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions, or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence. Judges should refrain from extended examination of witnesses; they should not, during the trial indicate an opinion on the merits, a doubt as to the witnesses' credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them.’ ”

In *Rooker v. Deering Southwestern Ry. Co.*, 226 S.W. 69, 70 (Mo. 1920), the Court held:

“It is the duty of the trial court to preside but not to take sides, or by act, conduct, or words to show his feeling in the case, and not to sacrifice the rights of a party for the saving of a little time.”

In *Pickerell v. Griffith*, 29 N.W. 2d 588, 595 (Iowa 1947), the Court said with respect to cross-examination:

“Cross-examination is a most important right to a litigant, and a most effective aid to the jury

and the court in the securing of justice in litigation. It has been said that 'the power and opportunity to cross-examine \* \* \* is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test (Starkie on Evidence I. 129).' . . . In *Jones v. Lazier*, 195 Iowa 365, 372, 191 N.W. 103, 106, the court said: 'The right to pertinently cross-examine a witness is not a matter of the trial court's discretion. It is a valuable right essential to a fair trial upon any issue of fact, and prejudice will be presumed from its arbitrary denial.' In *Schulte v. Ideal Food Products Co.*, 203 Iowa 676, 682, 213 N.W. 431, 434, the court said: 'The right of cross-examination of the adversary's witness is quite distinct in character from the right of a party to examine his own witness for the purpose of adducing facts. The right to cross-examine is quite absolute. It inheres in the right of the adversary to use the testimony of the witness at all. One of its purposes is to test the credibility of the witness.' See *Eno v. Adair County Mut. Ins. Ass'n.*, 229 Iowa 249, 256 et seq., 294 N.W. 323, and authorities cited."

The language in the above decisions are wholly applicable here. The conduct of the Court prevented appellants from having a fair trial.

So too did the conduct of appellee's counsel. As can be seen from Appendix "A", he frequently interrupted cross-examination for the purpose of interjecting gratuitous observations and on several occasions was admonished not to make "speeches". Such "speeches" occurred at other times during the trial, culminating in his remarks, with respect to appellee's tax liability in the event of a verdict in his favor. That such remarks constituted misconduct is shown in Point VII, *supra*.

There exists another occasion where appellee's gratuitous statements before the jury also constituted prejudicial misconduct. It occurred as follows:

"Mr. Galane: Plaintiff is willing to waive the instructions of the Court and present the arguments starting right after the luncheon recess. We feel that we trust your Honor's discretion as to how the instructions will be framed to the jury, and that counsel's function is simply to discuss with the jury at the summation the evidence that has been presented. I would be willing to start today to expedite the case." [T. 2725, lines 7-14].

Appellee's counsel knew the jury was impatient to get the case [T. 2724, lines 8-16]. Counsel's remarks were made for the purpose of unethically currying favor with the jury or having the jury infer that counsel was confident the jury would decide in favor of appellee and that the instructions were mere technicalities or both. In either event it was prejudicially improper. Cf., *Lancaster v. Texas*, 200 S.W. 167 (Tex. 1918), where the Court held improper a challenge by counsel to submit a case to the jury without argument. Appellee's counsel's accusation that counsel's statement was a falsehood (A-22, *infra*) also constituted misconduct. *Maxwell v. Durkin*, 57 N.E. 433, 434 (Ill. 1900).

It is submitted that because of the conduct of the Court and appellee's counsel appellants were deprived of a fair trial.

### Conclusion.

For the reasons stated herein, the judgment should be reversed.

Respectfully submitted,

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By SAMUEL S. LIONEL,  
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Inc., El Ranco Hotel Operating  
Co. and Beldon R. Katleman.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief, is in full compliance with those rules.

SAMUEL S. LIONEL







## APPENDIX A.

### Cross Examination of Appellee.

(By Mr. Lionel):

Q. What were the names of some of the revues that were put on in the Cabaret Eve while you were associated with it? A. Eve or Nouvelle Eve. In the Cabaret Eve I put on some 30 shows. You don't expect me to remember all the names.

Q. Do you remember any of them?

The Court: What good does that do us, Mr. Lionel? What possible good?

The Witness: The answer is no.

The Court: If you were claiming that this man didn't put on shows like this, why, I could see some point of it. [T. 1399, lines 2-13.]

(Although there was no objection, Court interrupted cross-examination of appellee. Counsel belittled by Court.)

The Witness: The name of the corporation is Escarpolette. However, there were two other corporations that run the show before Escarpolette. The corporation La Nartella and the corporation La Nouvelle Eve to which La Nartelle entrusted its business to be managed.

By Mr. Lionel:

Q. What year was the La Nouvelle Eve Corporation formed?

Mr. Galane: If your Honor please—let the witness answer and then I will make—

The Interpreter: Pardon me?

Mr. Galane: Go ahead, sir.

The Interpreter: It was a society with limited responsibility.

Mr. Galane: If your Honor please, there was testimony about management of La Nouvelle Eve, the word management—

The Court: Are you objecting that it assumes a fact not in evidence?

Mr. Galane: That is correct.

The Court: Sustained.

Mr. Galane: And I am objecting to—

By Mr. Lionel:

Q. What year was the La Nouvelle Eve Corporation formed?

Mr. Galane: Objected to—

The Court: I sustain the objection upon the ground that that question assumes a fact not in evidence; namely, that it was ever formed.

By Mr. Lionel:

Q. Mr. Bardy, you said that the La Nouvelle Eve Corporation managed or exploited the business for the corporation—

The Court: Don't go into all that. We have heard what the testimony is. Just ask him a question.

By Mr. Lionel:

Q. When was the La Nouvelle Eve Corporation formed?

Mr. Galane: Objected to.

The Court: I just sustained the objection twice; namely, it assumes a fact not in evidence. Ask him if it was formed, if there was a corporation such as that.

By Mr. Lionel:

Q. Was there a corporation known as the La Nouvelle Eve Corporation which managed the La Nouvelle Eve Club for La Nartella?

The Court: Why don't you break that into two questions and it will be simpler. Ask him if there was such a corporation.

By Mr. Lionel:

Q. Was there a corporation which managed the La Nouvelle Eve Club for La Nartella?

Mr. Galane: Objected to upon the ground that the interpreter is taking the management, which means Gerance and so changing it as to lead Mr. Bardy to say that there was a society Gerance de La Nouvelle Eve. That was a French society, not a French corporation, to manage La Nouvelle Eve, and I now realize a corporation is intentionally designed so that the translator will use the word "manage." Say Gerance, to Mr. Bardy, and he says there was a societe de la Gerance de La Nouvelle Eve. We have a right to object to this framing a question in order to get an admission from the witness.

The Court: Sustained in that form. Rephrase it. [T. 1405, line 15, to 1408, line 8.]

(Although the appellee clearly testified there was a corporation La Nouvelle Eve the Court invited and sustained the objection that questions concerning such corporation assumed facts not in evidence. The Court belittled counsel and appellee's counsel made a speech.)

(By Mr. Lionel):

Q. But what was the name of the company or corporation that put on shows at the club prior to its closing in 1955?

The Court: Just a minute. Are you using company and corporation synonymously now? Up to this point

you have been using the name company. [T. 1423, lines 18-23.]

(Although no objection, the Court interrupted counsel. The question was fair and the Court's comment could be interpreted by the jury as though counsel was doing something improper.)

By Mr. Lionel:

Q. During those years, 1952 to 1954, was Nartella a tenant of Mansart?

The Interpreter: What is the name of that other society?

Mr. Lionel: Mansart.

The Witness: The Societe Nartella was a tenant of the Societe Mansart.

The Court: Let's not spend any more time back in 1954, 1955 and 1956. This lawsuit concerns something that started in 1958, as I understand it.

Mr. Lionel: Your Honor—

The Court: Let's not have an argument about it. It seems to me you have covered that enough.

Mr. Lionel: I am getting to the heart of it.

The Court: Well, let's get to it. [T. 1424, line 25, to 1425, line 14.]

(Although no objection interposed Court improperly limited cross-examination.)

(By Mr. Lionel):

Q. When did the Societe de la Gerance de La Nouvelle Eve go out of busines or stop putting on shows at La Nouvelle Eve?

The Court: Now, he said they never produced a show.

Mr. Lionel: I submit, your Honor, he said that first, but then he said they exploited shows at that club.



The Court: Well, of course, there again it is a question—you say “put on.” What does that mean? He says “exploited.” What does “exploited” mean? It may be like two ships that pass in the night. You may not understand each other.

Mr. Lionel: May I ask that again, your Honor?

By Mr. Lionel:

Q. Did the Societe de la Gerance de La Nouvelle Eve put on shows at the La Nouvelle Eve Club from 1952 to 1954? A. No.

Q. What did that—

The Court: Did they own the show? [T. 1425, line 23, to 1426, line 17.]

(Unwarranted interruption by Court of cross-examination.)

(By Mr. Lionel):

Q. Now, isn't it true that in 1954 when the club closed it closed because—

The Court: He said 1955, didn't he?

Mr. Lionel: I will rephrase that your Honor.

By Mr. Lionel:

Q. Isn't it true that you put out La Nartella and La Gerance de La Nouvelle Eve because they didn't pay the rent?

The Court: He personally? Is that what you are saying?

Mr. Lionel: Yes, your Honor.

The Court: Let's say it to him. Isn't it true that he personally evicted? Is that it?

Mr. Lionel: Yes, your Honor.

The Court: These companies.

The Witness: It is true. [T. 1427, lines 4-20.]

(Unwarranted interruption by Court of cross-examination.)

Q. Do you have those assignments? A. I gave them, yes.

Mr. Galane: If your Honor please, could we have Exhibit 1 annexed to the deposition of Rene Bardy and take it out at this time?

The Court: You can take it out.

Mr. Galane: Fine.

The Court: If there is no objection. Do you want to offer a stipulation about it? Do you have the assignments?

The Witness: I gave them to my lawyer. I have the assignment only from the last society.

Mr. Galane: If counsel will continue, I will find them in here.

The Court: Proceed.

(Unwarranted interruption by Appellee's Counsel of cross-examination and approved by the Court.)

By Mr. Lionel:

Q. Was it unlawful for you to be one of the original shareholders in Escarpolette?

The Court: Now, you aren't going to want to ask him that, are you? He is a layman. You don't ask a layman if what he did was unlawful.

Mr. Lionel: Your Honor, we called the witness' testimony before—

The Court: Mr. Lionel, in fairness to the witness, you don't ask a witness a question—

Mr. Lionel: May I ask him if he knows, your Honor?

The Court: —a question of French law. That is a question I may have to decide or you may have to prove, if you claim that it is unlawful under French law for him to have done what he said was done.

Mr. Lionel: Would your Honor permit me to ask the witness whether he knows?

The Court: No, I wouldn't. How would he know? He is a layman.

Mr. Lionel: The witness testified before that he couldn't form it himself and he had these other people and had to give them money.

The Court: Well, of course, I don't know. That might have been something for tax purposes, it might have been a dozen different reasons.

Mr. Galane: That is not what he said, your Honor.

The Court: Pardon?

Mr. Galane: That is not what he said, sir. It is a distortion.

The Court: The jury heard what he said. Proceed.  
By Mr. Lionel:

Q. Mr. Bardy, do you have the—

(Discussion off the record.)

By Mr. Lionel:

Q. Mr. Bardy, where did you say the assignments of the interest of Guiol and Francois were?

The Court: He just said he gave them to the lawyer, didn't he, and his lawyer has them. I assume if you will ask—if you gentlemen are speaking to each other—you might ask the attorney for the plaintiff—

Mr. Galane: At the last meeting we were speaking, your Honor.

The Court: —if he has them, and you gentlemen might get going and stipulate what they are and not take the time of us here on this matter.

Mr. Galane: These are the photostats of what Mr. Bardy attached to his deposition. So far as I know, these are the blank assignments by Guiol and Francois. I know nothing more than I am sure counsel for the Hotel knows.

The Court: You are not accepting them; is that it?

Mr. Lionel: May I ask the witness more questions?

The Court: You mean about this?

Mr. Lionel: Yes.

Mr. Galane: May we mark these and have the witness interrogated?

The Court: Yes, the exhibits may be marked. Do you want them placed before the witness?

Mr. Lionel: I would like to ask another question or two with respect to the originals.

The Court: You may ask him all the questions you like with respect to the originals.

By Mr. Lionel:

Q. Mr. Bardy, do you—

The Court: Let's get these identified in the record. What are they, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 546 for identification.

The Court: Plaintiff's Exhibit 546 for identification.

By Mr. Lionel:

Q. Mr. Bardy, I show you what has been marked for identification as Plaintiff's 546.

The Court: Are these in French or English?

Mr. Lionel: French, your Honor. [T. 1429, line 9, to 1432, line 23.]

(Counsel's questions were proper. Court's comments could be interpreted by jury to mean counsel was being unfair to witness. Court's comment re. tax purpose could be interpreted as approval by Court of appellee's actions. Appellee's counsel's interruption to get exhibits marked and appellee questioned concerning them improper but approved by Court.)

(By Mr. Lionel):

Q. Now, did Escarpolette have shows at the La Nouvelle Eve?

The Court: What do you mean "have shows"? [T. 1433, lines 9-11.]

(Unwarranted interruption by Court of cross-examination.)

(By Mr. Lionel):

Q. Who ran the business at the Club during those three years?

The Court: You mean who owned the business? [T. 1433, line 24, to 1434, line 1.]

(Unwarranted interruption by Court of cross-examination.)

(By Mr. Lionel):

Q. Was she a singer in the 1958 show called Shocking? A. I have to refer to the program.

The Court: Does it matter? [T. 1436, lines 21-24.]

(Singer was Tanya Floria, one of appellee's dummies. The question was proper and interruption unwarranted and belittled counsel.)

(By Mr. Lionel):

Q. During the years 1956, 1957 and 1958, who paid the payroll at the La Nouvelle Eve?

The Court: Club?

Mr. Lionel: Club.

The Court: Do you understand the question? [T. 1437, lines 21-25.]

(Unwarranted interruption by Court of cross-examination.)

Q. What else did Mr. Bardy pay for in the 1956 show Extravanzas? A. I paid everything that had reference to the show.

The Court: Can't we move up to 1958 now and get up to the time when we are really talking about a show that was brought to Las Vegas?



Mr. Lionel: If the Court please, on direct examination the witness testified he spent \$200,000.

The Court: You haven't asked him about any money yet. He is testifying about an arrangement—

Was that arrangement you made with the authors society, was that to save the taxes?

Put that to him, Mr. Interpreter.

The Witness: Yes, your Honor.

The Court: Proceed, Mr. Lionel.

The Witness: The question of societies was always a question of making declarations.

The Court: What are declarations, tax returns?

The Witness: Regarding the income in the year, tax returns.

The Court: Tax returns. [T. 1438, line 16, to 1439, line 12.]

(Appellee had testified on direct that he had spent \$200,000 since 1956 and was now claiming damages for loss of his property. The question was proper. Counsel should not have been limited. Again the Court makes appellee's peculiar transactions appear legal because motivated by tax considerations.)

(By Mr. Lionel):

Q. And yet all the revenue which came from the people who saw the show went to Escarpolette?

Mr. Galane: That is objected to as not based upon evidence.

The Court: Argumentative; sustained. [T. 1440, line 23, to 1441, line 2.]

(The Court sustained an objection although made on an improper ground.)

The Court: How much longer do you estimate you will be, Mr. Lionel?

Mr. Lionel: At least a day, your Honor.

The Court: No you won't. I will give you tomorrow morning at the outside. I am not going to permit this to go on interminably. Now, this witness has told you that he had a deal, he had a lot of tax arrangements, but he told you he had a deal whereby anything put on outside that club was his responsibility and belonged to him. Now, I assume he is going to say that as long as he stays on the stand. If you have anything to impeach him with about it, let's get down to the business of impeachment about it, and let's not try every show that has ever been in that club. He has told you just exactly what his story is. Now, you don't have to accept it, but unless you have something to discredit it, let's move on to something else.

Mr. Lionel: Your Honor, can't I discredit that story by having him repeat it and showing how incredulous it is?

The Court: I don't know whether you can or not. You can argue how incredulous it is. He told us what the situation is. I don't assume he is going to change it if you ask him about 40 different years up there, or anything else. Now, if you have something that you have to go at to discredit what he said, let's get to it. I believe in cross-examination if it discredits a witness. I don't believe in the kind of cross-examination that permits a witness to tell his story three or four different times. I don't think it helps us, and we don't need it. You have his story. Now, if you are going to impeach him, let's get about it, get about discrediting him. Otherwise I am going to cut you off, I warn you. I will just have to do it. We can't put on every show that they have ever put on in this club.

Mr. Lionel: Three years at the same club that was involved in 1958 when the contract was made there is one society only. I have a right to cross-examine on that.

The Court: You are. What have you been doing all afternoon but cross-examining him on it? He says the Club Escarpolette, whatever you call it, whether you call it an anonymous society or limited company, whatever it is, he said they, in effect, ran the club; they took in the receipts and he had this side arrangement where he split up the income, I suppose, to save taxes. It seems pretty obvious, but the crucial thing he says is he had a deal whereby when the show went out of that club for any place other than that club, that he was responsible, and that he put it on and he got the income from it. Now, that is his story.

Mr. Lionel: I am coming to that one, your Honor.

The Court: All right, let's get over with it. I don't assume he is going to change. You may discredit it. Now, let's get at it, right down to the meat of the thing.

Mr. Lionel: I am trying to proceed as rapidly as I can.

The Court: We haven't come up to the year 1958 yet. We have been all afternoon on '52, '53, '54.

Mr. Lionel: These were matters that were gone into on direct examination, your Honor, to show the background, in an attempt to show secondary meaning. They brought in the Paris Herald and other papers starting in the year 1950, your Honor.

The Court: Oh, there are a great many documents in evidence.

Mr. Lionel: Your Honor, I have a right to show, I believe, on cross-examination—I say that respectfully

—what the situation was; that they couldn't stay in business during those years. I should have a right.

The Court: You have gone into it.

Mr. Lionel: I have gone to the next subject after I felt I was through. I have never in my life previously examined in depositions, court or otherwise, a witness who did not speak English. This is the first time I have ever done it. It is a difficult problem.

The Court: It is a difficult problem. That is what makes it difficult for all of us.

Mr. Lionel: I recognize that.

The Court: Now, as I say, he told a story. Of course, you don't have to accept the story, you may discredit it in any way you can. Let's see if we can't organize it where we can start at 9:30 and you be through by 12:00. [T. 1441, line 21, to 1444, line 23.]

(Improper limitation on cross-examination. Court told jury what appellee had testified to and that counsel had failed to discredit appellee on his story. Whether witness was discredited was for the jury to determine. Court belittled counsel.)

(By Mr. Lionel):

Q. Does the Hotel's Exhibit No. 1 represent or show the La Nouvelle Eve Club as it has appeared within the last 30 days?

Mr. Galane: Your Honor please, we will certainly stipulate, if counsel for the Hotel represents he had these pictures taken, we will stipulate they may go into evidence, and we will not spend any further time on it.

The Court: Very well. [T. 1447, lines 2-9.]

(Improper interruption by appellee's counsel and approved by the Court.)



(By Mr. Lionel):

Q. Do you have a copy of that, Mr. Bardy? A. No.

The Court: Do you mean with him or anywhere in the world, or—[T. 1449, lines 18-21.]

(Unwarranted interruption of cross-examination.)

(By Mr. Lionel):

Q. Is it not then true that there was no written lease between Mansart and Escarpolette?

The Court: At what time? [T. 1456, lines 12-14.]

(Escarpolette was tenant in 1958 only. Question was proper and the interruption unwarranted.)

(By Mr. Lionel):

Q. What month did Escarpolette go out of business? A. In December, 1958.

Q. What was the reason it went out of business in December of 1958? A. There was no particular reason. It was decided to terminate it.

Q. Was that because it was convenient to you? A. Yes, it was convenient for me.

The Court: Was it for tax purposes? [T. 1456, line 20, to 1457, line 3.]

(Unwarranted interruption of cross-examination.

Again implication by Court that tax purposes puts stamp of legality on appellee's corporate dealings.)

By Mr. Lionel:

Q. Mr. Bardy, I show you Hotel's Exhibit B, and ask you whether you have ever seen the French portion of that exhibit.

The Court: Will you stipulate that he has, and we will save time on that? [T. 1458, lines 20-24.]

(Jury has right to observe demeanor of a party. Counsel should not be required to stipulate facts during cross-examination of a party.)



Mr. Lionel: Q. Is it not true, Mr. Bardy, when Escarpolette went out of business Escarpolette had no money, no property, no assets?

Mr. Galane: If your Honor please—

The Court: What do you mean, “when it went out of business”? Do you mean when it was finally liquidated?

Mr. Lionel: No, your Honor, at that time.

Mr. Galane: If you Honor please—

The Court: Just a moment. Yes, but specify, because it could mean, I take it, that any company that is finally liquidated has nothing left, but the question is as of when you are speaking. When does your question apply?

Mr. Lionel: I will rephrase it, your Honor.

By Mr. Lionel:

Q. In December of 1958—

The Court: At the time of this resolution?

Mr. Lionel: Yes. [T. 1465, lines 5-22.]

(Unwarranted interruption of cross-examination.)

(By Mr. Lionel):

Q. I take it then from your testimony, Mr. Bardy, that the only copies of these two assignments are those which are attached to Plaintiff's 546 for identification? A. Yes, I agree.

Q. Isn't it true that whoever has the original can insert his name?

The Court: Are the originals available?

Mr. Galane: I don't know, your Honor. I have the impression, though, that Mr. Bardy said yesterday that the originals were in Paris. Now, that is my recollection, and at this moment I don't know.

The Court: Well, you don't have them?

Mr. Galane: I don't have them. We gave them these copies to the deposition. I assume Mr. Bardy—

The Court: Now, don't make a speech.

Mr. Galane: All right. We don't have them, sir.

The Court: As to the last question, why, I suppose you don't need to ask that; if someone has it they can write. If there is a blank they can fill the blank.

Mr. Lionel: Well, could we also then have a stipulation—

The Court: They are able to fill the blank, I assume. Whether they may lawfully do it, or with propriety do it, may be another question.

Mr. Lionel: I will offer in evidence—

The Court: Ask him who has the originals.

Mr. Lionel: He said he didn't know. He testified he didn't know where they were.

The Court: He didn't testify he didn't know who had them. [T. 1468, line 13, to 1469, line 17.]

(Unwarranted interruption by the Court. Speech by appellee's counsel.)

(By Mr. Lionel):

Q. Do you know what the letters P.P. stand for?

A. For myself and for my artists, for my troupe.

Q. Do you know what the letters P.O. mean when used in front of a signature?

Mr. Galane: If you Honor please—

The Court: Is that in French, now?

Mr. Galane: That is objected to.

The Court: Is this American?

Mr. Lionel: I am talking about when Mr. Bardy uses it.

The Court: Don't ask him if he knows what it means. Ask him what he means by it when he signs, not what he knows by it.

Mr. Galane: If your Honor please, they are switching letters from P. P. to P. O.

The Court: I don't know what the purpose of it is. [T. 1472, lines 8-23.]

(Unwarranted interruption by the Court. Accusation by appellee's counsel.)

(By Mr. Lionel):

Q. Mr. Bardy, I show you—

The Court: Is P. P. a French expression, does the record show? I haven't heard it. What does P. P. mean? Does it mean something in French?

The Interpreter: Yes, it does.

The Court: Now, you aren't testifying. Don't you get in this.

Mr. Foley: That would be a matter—

The Court: Can we have a stipulation about it, or shall we ask the witness?

Mr. Galane: I would like to ask him, your Honor.

The Court: Mr. Bardy—

Mr. Lionel: Your Honor—

The Court: Mr. Bardy, does P. P. mean something in French?

The Witness: It doesn't mean anything.

The Court: Well, is it an abbreviation for two words?

The Witness: As far as I am concerned, it was an abbreviation for myself.

The Court: Is it an abbreviation of some French words?

The Witness: Yes, it is an abbreviation.

The Court: Of what words?

The Witness: For myself and for my troupe.

The Court: But what are the French words that P. P. is an abbreviation of?

The Witness: There is no abbreviation. I signed for—

(Witness writes on piece of paper.)

The Interpreter: I was handed here two lines written by Mr. Bardy.

The Court: Show it to counsel.

In English, when we put something at the end of a letter—I am speaking now to him—in English when we put something at the foot of a letter we say “P.S.” That means post script.

The Witness: In French the same.

The Court: Very well. What does P. P. mean in French?

The Witness: If I was—If my name was Peter, I would put a “P” for “Peter” before my name.

The Court: But your name is Rene; is it not?

The Witness: Rene Felix Louis Francois.

The Court: Very well. When you sign your name and put P. P. in front of it, what does that mean in French?

A. It depends what I am writing. I am not always using the symbol P. P.

The Court: Do others in France when they sign a legal document, put P. P. in front of their name?

The Witness: You know, it is an abbreviation.

The Court: Of what?

The Witness: I just told you, indicating the written text.

The Interpreter: May I translate?

The Court: Read it.

The Interpreter: (Reading paper written by witness) The text says “For myself and for my troupe, P. P.”

The Court: Well, what are the French words P. P.? Is that an abbreviation of French words?

The Witness: There is no abbreviation. It is an abbreviation for myself.

The Court: Well, is it commonly used in France?

The Witness: I am using it for the purpose of writing, P. P.

The Court: Do others use it? [T. 1473, line 17, to 1476, line 5.]

(Unwarranted taking over of cross-examination by the Court on a vital matter.)

(By Mr. Lionel):

Q. And have you used them on contracts?

A. When I am signing for one of my societies, and signing as the president of the Societe Escarpolette, I sign always as the president of the societe Mansart. If as I am making a society with names that have been given to me for the use, for that purpose.

The Court: What do you sign? What do you write when you sign as president of one of your societies?

The Witness: For the Societe Mansart, I am signing the president, Rene—

The Court: But what do you write? Just tell us exactly how you write it.

[T. 1476, line 16, to 1477, line 2.]

(Unwarranted interruption by Court of cross-examination.)

By Mr. Lionel:

Q. Now, did you ever sign for La Nouvelle Eve Corporation P. P. Rene Bardy?

A. I just told you yes. It is marked here.

The Court. It is marked there P. O. The question is did you ever sign P. P.?



The Witness: I could put the initials of all my four names in front of my signature. Nobody could prevent me from doing so.

Mr. Galane: If your Honor please, I would stipulate—I thought we had yesterday—there was a French document P. P. I think it should be stipulated that there is in evidence as—I ask Mr. Pratt the number—a French translation of a contract—

The Court: Well, you get up your own numbers.

Mr. Galane: I think it is Exhibit 90 and Exhibit 472. The translation says “La Nouvelle Eve Corporation, P. P. R. Bardy.” I think I can stipulate to that.

The Court: Offer a stipulation and give the exhibit number.

Mr. Galane: No, this one doesn’t have it. 90, does that have P. P. R. Bardy?

A Juror: It is 90.

Mr. Galane: I will stipulate 90 has P. P. R. Bardy.

The Court: It speaks for itself, doesn’t it?

Mr. Galane: That is my recollection of the evidence.

The Witness: Moreover, it was a document of courtesy.

The Court: Do you accept that stipulation?

Mr. Lionel: I accept that stipulation.

The Court: That applies to what, Exhibit 90?

Mr. Galane: 90 says, “P. P. R. Bardy, stage name La Nouvelle Eve.” [T. 1483, line 16, to 1484, line 21.]

(Unwarranted interruption of cross examination by Court and appellee’s counsel, Court approved interruption by appellee’s counsel to offer a stipulation. Again a speech by appellee’s counsel)

(By Mr. Lionel)

Q. Did she have anything to do with the shows at La Nouvelle Eve?

The Court: You mean the club?

Mr. Lionel: The club.

The Court: In Paris? [T. 1485, lines 18-22.]

(Unwarranted interruption by Court of cross examination)

(By Mr. Lionel)

Q. Was she listed as the author of the shows at La Nouvelle Eve?

The Court: Didn't we go over all that yesterday, that she was a member of the authors society and he used her name to collect an author's fee, and he gave her a commission, and he took the rest of it? Didn't we go over all that yesterday?

Mr. Lionel: Yes, your Honor. This is cross examination, I submit.

The Court: Very well, proceed. You aren't asking him cross examination questions about it. [T. 1486, line 5-15.]

("Yesterday" had been direct examination. The question was proper and the interruption was warranted. Court's comment belittles counsel)

(By Mr. Lionel)

Q. I call your attention to the fact that the first page is dated November 25, 1958, and the rider attached to that, the additive, refers to a contract dated December 1, 1958—

The Court: Does the record show who prepared this document? [T. 1489, lines 11-16.]

(Unwarranted interruption by Court of cross examination)

The Court: Do you have what you say is the original?

Mr. Lionel: Yes, your Honor.

The Court: Well, why hasn't it come out before now?

Mr. Lionel: Because it is the Plaintiff's exhibit to Mr. Gerber's deposition. They had it.

Mr. Galane: Excuse me. Mr. Gerber produced documents on that deposition. That is a falsehood. We did not produce documents for Mr. Gerber.

The Court: I don't understand why you have copies made and given to the jury when you claim that you had a copy; that this was not the contract, and you had a document, Mr. Lionel, which you said was a contract.

Mr. Lionel: Your Honor, at the time that 90 was issued, I did not have that document, and I found it later. We found it attached to Mr. Gerber's deposition.

Mr. Galane: Your Honor, I would like them to produce Beldon Katleman's signature on any other document in this case but what Mr. Bardy has. I haven't seen it yet after almost three years of depositions. They haven't produced a signature of Beldon Katleman.

The Court: Proceed, Mr. Lionel. What is the question?

Mr. Lionel: Would you read the last question back?

The Court: This document is in English. I assume it was not prepared by this witness, unless you think he can read English. I don't know why you should put any question to him about the dates. I don't assume he prepared it. Now, if you gentlemen can't stipulate as to who prepared Exhibit 90, then— [T. 1491, line 1, to 1492, line 4.]

(Appellee's counsel accuses appellant's counsel of lying. Speech by appellee's counsel re. Katleman's signature is deliberate misconduct)

The Court: And you represent that you have never known until when?

Mr. Lionel: That I have never seen this document until about five or six days ago when I asked Mr. Pratt to see Mr. Gerber's deposition.

Mr. Galane: Would counsel afford me the courtesy? I would like to see Mr. Katleman's signature.

Mr. Lionel: I am talking about the first page that Mr. Bardy has.

Mr. Galane: I would like to know where Katleman's signature is. For three years I have been asking this, after 30 depositions in this case, where on the first page is the Katleman signature? I still ask it, sir. They take—

The Court: Now, just a moment. Proceed.

Mr. Lionel: May I have Exhibit—

The Clerk: Here is the folder. I don't know what you want out of it.

Mr. Lionel: Plaintiff's A.

The Court: If you are going to spend time with Mr. Bardy asking him about the preparation of a document which you all agree he did not prepare, then that will take time out of your cross examination, Mr. Lionel. [T. 1492, line 23, to 1493, line 19.]

(Again unwarranted remarks by appellee's counsel concerning Katleman's signature. Again limiting and hurrying cross examination)

(By Mr. Lionel)

Q. Did you propose any changes to it?

A. Yes. For instance, on this page, indicating a handwritten addition.

The Court: Handwritten addition?

The Witness: Yes.

The Court: A handwritten addition?

The Witness: Yes.

The Court: Whose handwriting is that?

The Witness: It comes from the impresario in Paris. That should be Mr. David Stein.

The Court: David Stein. [T. 1495, lines 11-21.]  
(Unwarranted interruption by Court of cross examination)

By Mr. Lionel:

Q. Mr. Bardy, did you ever sign a first page to the contract which bore the date of December 1, 1958?

The Court: Do you have such a document?

Mr. Lionel: I certainly do.

The Court: Show it to the witness.

Mr. Galane: I will stipulate they have it, but no signature of Beldon Katleman. [T. 1496, line 25, to 1497, line 6.]

(Unwarranted interruption of cross examination by Court. Again appellee's counsel interjects re. Katleman's signature)

By Mr. Lionel:

Q. Mr. Bardy, did you ever see Hotel's Exhibit E before?

The Court: Is it in the English language?

Mr. Lionel: Yes, your Honor.

The Court: Are you trying to show it has his signature?

Mr. Lionel: Yes, your Honor.

The Court: Ask him if his signature appears on it. Don't ask him if he ever saw an English document before. I wouldn't want anyone to ask me if I ever saw



a French document before. If it bore my signature, that is another thing. [T. 1497, line 25, to 1498, line 11.]

(Court's comment subject to implication counsel unfair to appellee)

(By Mr. Lionel)

Q. And that is what you wrote under the words, "La Nouvelle Eve Corporation, Artist, P. P. R. Bardy"?

Mr. Galane: Objected to, your Honor, upon the ground the document is not yet in evidence, and counsel for Mr. Katleman is reading terms the way he chooses when he asks the question. He could ask if it is his signature. The document is still not in evidence. I object upon that ground.

Mr. Lionel: I am trying to lay foundation.

The Court: He said he signed—he did not sign the original, but as I understand it, this is a photostatic copy, but he did not sign the original, as I understand the testimony.

Is that your understanding?

Mr. Lionel: No, your Honor.

The Witness: I am trying to explain—

The Court: Is that your signature on the third page of Exhibit D? Is that your signature, "P. P. R. Bardy"? [T. 1502, lines 8-24.]

(Unwarranted interruption by Court and appellee's counsel. Appellee's counsel accuses counsel of improper conduct)

(By Mr. Lionel)

Q. Mr. Bardy, I refer you to Plaintiff 90A. Is it not true the date of the first page of that exhibit is November 25, 1958?

The Court: It speaks for itself. I will sustain my own objection.

By Mr. Lionel:

Q. Mr. Bardy, did you ever sign a first page of a contract with the Hotel after November 25, 1958?

The Court: You mean dated some date after? [T. 1503, lines 16-25.]

(The latter question was a proper one. The interruption was not warranted)

(By Mr. Lionel)

Q. Mr. Bardy, is it not true that Hotel's Exhibit E, which you signed, bears the date of December 1, 1958?

A. It is dated December 1, 1958. However, this date cannot exist, because this is a contract which has been prepared before the date of November 25, 1958.

Q. Mr. Bardy—

The Court: Now, let's move on to something else. I assume Mr. Katleman will testify in this case?

Mr. Lionel: Yes.

The Court: Is it possible that under this arrangement that we have to have all this dispute about what is the contract between these business organizations?

Mr. Lionel: Your Honor, I worked until early this morning attempting to find the correct chain. These things went back and forth across the ocean like hail and rain and snow.

The Court: Very well.

Mr. Lionel: I should have a right to show—

The Court: These are English documents. Don't waste time. You have heard what this witness said.

Mr. Lionel: But, your Honor, please understand the problem. They have introduced an exhibit which is

dated November 25th which has a rider referring to December 1st.

The Court: What does the date have to do with it? What we are interested in is what is the final copy of the agreement. Now, certainly, doesn't the Hotel have a copy of it? Doesn't MCA have a copy of it?

Mr. Lionel: The MCA copy is attached to Gerber's deposition, and this is it, and we are trying to put it in.

The Court: I am not asking you to testify about it. Don't you gentlemen expect to offer something from your files? Now, the most he can say, apparently, is this is his signature.

Now, you have established that. Now, what else can he say about it? It is in the English language, which apparently he doesn't understand.

Mr. Lionel: Well, we feel we have a right to offer it on that basis, because that is the only identification he made of Exhibit 90A.

The Court: Assume if Mr. Katleman testified, or if someone else testified besides this plaintiff in the case, then I assume you can lay a further foundation and offer it. [T. 1504, line 20, to 1506, line 11.]

(Unwarranted interruption by the Court. Whether Katleman would testify and on what subject was for his counsel to determine. Counsel has right to elicit relevant information from adverse party on cross examination. Again Court rushed cross examination.)

By Mr. Lionel:

Q. Do you have any contracts showing those times that it appeared in those places? A. I had some, but I am not sure that I didn't—gave them to my lawyer.

The Court: Which lawyer?

Mr. Galane: I have contracts on Nice and Cannes, your Honor.

The Court: Why don't you tell—

Mr. Galane: That was the first I heard, sir.

The Court: Now, you gentlemen are supposed to exchange all documents.

Mr. Galane: They have had it since November, your Honor, the list of documents, and the first I heard they were going to ask for it was one moment ago, and they have had my list now since November, sir.

The Court: What exhibit is it?

Mr. Galane: If they will just give me a minute.

Mr. Lionel: I have them all together now with translations.

Mr. Galane: One moment. I think 60 may be—59 and 60 may be the Riviera contracts for 1958, and I think 61 may be a Riviera contract. Do you want the German contracts, 63 and 64, so we have them all out now?

By Mr. Lionel:

Q. Mr. Bardy—

The Court: Will you want 63 and 64, the German contracts?

Mr. Galane: That is the Dusseldorf and Hanover contracts.

The Court: Will you want those?

Mr. Lionel: No, your Honor. [T. 1526, line 15, to 1527, line 21.]

(Unwarranted interruption of cross examination by Court. Interjections by appellee's counsel wholly improper, but approved by Court)

By Mr. Lionel:

Q. Wasn't there a lawsuit about that?

The Court: What would be the purpose of all this?

Mr. Lionel: To show, your Honor, they have attempted to establish secondary meaning to show that this show was a big success. We should have a right to show that this is not true. [T. 1531, line 21, to 1532, line 1.]

By Mr. Lionel:

Q. Did any problem arise over the Dusseldorf show?

Mr. Galane: That is objected to as too ambiguous.

The Court: Sustained.

Mr. Lionel: I haven't finished the question.

The Court: It would be a strange undertaking if some problems didn't arise.

By Mr. Lionel:

Q. Mr. Bardy, who was the author of the La Nouvelle Eve show which appeared in Dusseldorf in 1958? A. Mr. Bardy.

Mr. Lionel: May we open Mrs. Deryckere's deposition for a moment?

The Court: Can it be stipulated that she was represented as the author of these matters?

Mr. Galane: If they have—

The Court: Or the society for the purpose of getting royalties and dividing them with the plaintiff? Is that what you want?

Mr. Lionel: I want to go beyond. I am going to this witness' credibility.

Mr. Galane: If they are, sir, we want Mrs. Deryckere's letters put in at the same time.

The Court: You mean as to whether or not she is actually the author? Is that what you mean?



Mr. Lionel: I am trying to lay a foundation for a letter by Mr. Bardy at this moment with respect to that situation.

The Court: Why don't you ask him about the letter, then, and not ask him this question?

By Mr. Lionel:

Q. Mr. Bardy—

The Court: He said, as I understand, that she has been registered as the author and that she gets a royalty as an author and that she gets something out of it and gives him the rest of it. Do you want to impeach him on that?

Mr. Lionel: With respect to this situation—well, your Honor, this I think goes to show—this is very crucial, I feel. I would rather not argue it in front of the jury, your Honor.

The Court: Very well, go ahead, if you feel it is. I thought he had covered it yesterday. [T. 1533, line 13, to 1535, line 5.]

(Interruption by Court makes light of appellee's scheme re. author's royalties. Requirement of stipulation during cross examination improper. Demand by appellee's counsel re. Deryckere's letters deliberate misconduct)

By Mr. Lionel:

Q. Mr. Bardy, I show you what has been marked for identification as Hotel's Exhibit H, and I ask you whether or not that is not a copy of a letter you wrote to the person whose name appears therein. A. Yes, it is a copy.

Mr. Galane: Your Honor, the witness said "To Mr. Morazzani," and the interpreter says, "Yes, it is a copy." Now, he not only said this in French, it was Ital-

ian. He said Mr. Morazzani, and I think he said who he is. He is the head of the Authors Society, and I would appreciate it if the jury—

The Interpreter: He didn't say it.

Mr. Galane: He said Mr. Morazzani.

The Court: Wait a minute. You are not the Interpreter, and I will not permit you to argue with the Interpreter any more than I would the Reporter. If the Reporter has it down one way, that is the way it is. We have to have someone who is official, and this is an official interpreter, and if he says the witness said so and so, then the jury is the only one who can dispute it. [T. 1535, line 8, to 1536, line 2.]

(Appellee's counsel argues with interpreter and makes speech)

By Mr. Lionel:

Q. Directing your attention again to Exhibit H, Mr. Bardy, did your name appear on the original under the words—

The Court: What is this document now?

Mr. Lionel: It is a letter sent—

The Court: Is it marked?

Mr. Lionel: It is Exhibit H.

The Court: It is Exhibit H. Well, it speaks for itself, doesn't it?

Mr. Lionel: Except, your Honor, that this is a copy produced by the plaintiff, which apparently has a little area that didn't come out on the photocopying process, and I would like to establish Mr. Bardy's name appeared in that area.

The Court: You mean he signed, or his name appeared in printing?

Mr. Lionel: Printing, probably.

Mr. Galane: We may stipulate, if they will let us see it, sir.

The Court: Why not print it in there, if you can stipulate to it?

Mr. Lionel: I don't see Mr. Bardy there.

(Discussion off the record.)

The Court: The question is, is it so stipulated?

Mr. Galane: We can't, no, sir.

By Mr. Lionel:

Q. Mr. Bardy, on Exhibit H, did your stationery have the name Rene Bardy under the words,

“NEE ARTISTIQUE ‘VARIETY’

“representee par”?

The Court: Stop him, Mr. Interpreter, and tell us what he is saying.

The Witness: The register of commerce is not a society. It was Mr. Doornick.

The Court: The question is, did your name appear up there in the upper left-hand corner of that letter?

The Witness: In the tribunal of commerce this title Artistique Variety—

The Court: That is not the question. The question is did your name appear in the upper left-hand corner of that letterhead? Yes or no.

The Witness: It is a photostatic copy. It is not on the photostatic copy.

The Court: Did it appear on the original?

The Witness: It was signed, but it didn't appear on the photostatic copy. [T. 1537, line 14, to 1539, line 10.]

(Unwarranted interruption and taking over of cross examination)

(By Mr. Lionel)

Q. And she was working, you say, with the costumes at La Nouvelle Eve? A. Yes, she was in charge of the costumes.

The Court: Was she an author?

Mr. Lionel: I beg your pardon?

The Court: Was she an author? [T. 1542, line 24, to 1543, line 4.]

(Unwarranted interruption by Court of cross examination)

(By Mr. Lionel)

Q. Mr. Bardy, when did you first meet Harold Conner?

The Interpreter: First meet—

The Reporter: Harold Conner.

The Court: The Las Vegas accountant.

The Witness: When we begun it was at the end of January, 1959.

By Mr. Lionel:

Q. Was a bank account opened for the show? A. Yes, a bank account was opened for the show.

The Court: Isn't that all admitted and in evidence? The checks are in evidence, aren't they?

Mr. Lionel: Well, the jury has only seen one of them.

The Court: They see everything in evidence.

Mr. Galane: Everything is in evidence, the whole safety deposit box.

Mr. Lionel: I have a problem. We have a document, and the jury's attention is not called to it. I want to be sure I am able to argue that, in view of your Honor's ruling.

The Court: You mean the checks?

Mr. Lionel: Yes, your Honor.

The Court: Anything that has to do with this issue, as to in what name the contract with the Hotel was made, you may call attention to. You don't need to read all those checks.

Mr. Lionel: I don't intend to.

The Court: It shows what it shows, does it not?

Mr. Lionel: Yes.

The Court: And the name in which the account was, and the checks, and it is stipulated as to signature; is it not?

Mr. Galane: Yes. I think for one part of the time it was Mr. R. Bardy and Harold Conner. Then when Mr. Bardy left it was Peter Holmes and Harold Conner. Am I correct?

Mr. Lionel: I would like to ask about it generally. [T. 1543, line 25, to 1545, line 9.]

(Unwarranted interruption by Court of cross examination. Unwarranted interjections by appellee's counsel)

(By Mr. Lionel)

Q. Mr. Bardy, did you sign any signature cards on the account for the show in Las Vegas?

The Court: Are they here?

Mr. Lionel: No, your Honor.

The Court: May it be stipulated he did? He had to.

Mr. Galane: Your Honor—

The Court: May it be stipulated that he did?

Mr. Lionel: I don't know.

The Court: For the purpose of this case?

Mr. Galane: The bank wasn't able to produce cards for me.



The Court: No cards on the account at all?

Mr. Galane: I have been inquiring for three years, and they have no cards. I subpoenaed Mr. Giannoti. He checked for me. No cards.

The Court: No signature cards?

Mr. Galane: Not a signature card, not a record in the Bank of Nevada, and I talked to the top officials.

The Court: Is this the Las Vegas way of doing business?

Mr. Galane: I don't know sir. I talked to the top officials of the Bank of Nevada.

The Court: Don't testify now. May it be stipulated that the signatures of Rene Bardy and Harold Conner were on the bank cards?

Mr. Galane: I know it was on some checks. That is all I can stipulate to, sir. I can't stipulate to something I have never seen.

The Court: Well, the checks were honored.

Mr. Galane: Yes, and I have seen his signature on checks. I have never seen the card.

The Court: Proceed. [T. 1546, line 4, to 1547, line 10.]

(Unwarranted interruption of cross-examination by Court. Improper attempts by Court to get stipulation on important issue. Speeches by appellee's counsel)

By Mr. Lionel:

Q. Before you left for Paris on March 6, 1959, didn't you have Peter Holmes' name put on that bank account instead of yours? A. I wasn't in the bank. They brought me a card. I gave the signature for the bank, because two signatures were necessary for signing checks. As I was going back to Paris and couldn't sign, I gave the right to sign to Mr. Peter Holmes.

Q. And you signed something so that Peter Holmes could sign?

The Court: He has answered it. He has answered it. Go ahead with something else.

By Mr. Lionel:

Q. Did you read it before you signed it, Mr. Bardy?

A. It was in English. I was told that it was for the purpose of the signature. I signed it.

Q. Did Mr. Holmes tell you that? A. It was Mr. Conner who asked me to sign.

Q. Was Mr. Holmes there at the time you signed it? A. Yes.

The Court: "It" being, I take it, a signature card?

Mr. Lionel: Either a signature card or a power of attorney, your Honor.

The Court: Do you have any documents?

Mr. Lionel: No, but I am advised—

The Court: I don't want any testimony.

Mr. Lionel: I do not have them at this time, your Honor.

Mr. Galane: At this time—

The Court: You don't have any at this time. All of the documents in this case are supposed to have been in long ago.

Mr. Lionel: This would be rebuttal, your Honor.

The Court: It doesn't matter what it is. It should have been in the hands of the Clerk. If you have any documents, even though impeaching documents, I told you gentlemen they may be filed with the Clerk under seal, any impeaching documents or rebuttal documents will be marked and be in the hands of the Clerk.

Mr. Lionel: These are bank records that will have to be subpoenaed.

The Court: They should be here.

Mr. Galane: Your Honor—

The Court: It isn't right to ask the witness about documents and not have them before him. Now, are you representing that you have under subpoena some signature cards and so forth from the bank?

Mr. Lionel: No. I represent that I have spoken to the man in the bank who said—

The Court: I didn't ask what he said.

Mr. Lionel: I cannot make the representation your Honor inquired about.

The Court: Proceed.

By Mr. Lionel:

Q. Who took care of the records for the show in Las Vegas?

The Court: Is it stipulated Mr. Conner did? Isn't that the stipulation? Isn't it stipulated, Mr. Galane, that Mr. Conner took care of the records of the show?

Mr. Galane: So stipulated. [T. 1547, line 23, to 1550, line 9.]

(Interruption of cross-examination. Limiting and rushing of cross-examination. Belittling of counsel. Imputing unfairness to counsel. Requiring counsel to stipulate.)

By Mr. Lionel:

Q. Mr. Bardy, to whom did the Hotel make the weekly payments? A. To the artists. It means—

The Court: Aren't you going to be able to show that? You represent the Hotel. I assume you have the records. What difference does it make?

Mr. Lionel: Well, your Honor has permitted the witness to testify that he didn't receive money, and I want to show that he was never given any money.

The Court: Can't it be stipulated as to how the payments were made?

Mr. Galane: To MCA Artists, stipulated.

The Court: Offer a stipulation.

Mr. Galane: The contract says to MCA Artists, Ltd., as a collection agent.

The Court: May it be stipulated that everything paid under this contract for the benefit of this plaintiff or the La Nouvelle Eve show was paid to the MCA Artists?

Mr. Galane: To MCA Artists, Ltd., as collection agent.

The Court: I assume they take out their 10% and pay other people.

Mr. Foley: I can't stipulate to that, your Honor. I think somewhere along the line a check was given correctly to the La Nouvelle Eve Corporation.

The Court: Let's ask the witness.

Did you ever receive any check directly from the El-Rancho Vegas Hotel in Las Vegas? Did he personally? Did the Hotel pay you personally either by cash or check any money directly?

The Witness: No.

By Mr. Lionel:

Q. Isn't it true that except for money paid to Artists, all the money was paid to MCA?

The Court: Can't it be stipulated?

Mr. Foley: If your Honor please, I think there is some time during this that this was not case.

The Court: I assume the Hotel will be able to show, won't it?

Mr. Foley: I think that is true, in most instances.

The Court: Put the question, if he knows. Ask him. Isn't it true that all of the money, except what was paid to artists, for this show, was paid to MCA, if you know?

[T. 1550, line 21, to 1552, line 14.]

(Improper limiting of cross-examination. Counsel has right to elicit relevant evidence on cross-examination and should not be required to offer direct evidence only. Again Court attempts to have appellants stipulate.)

(By Mr. Lionel)

Q. Was that ten or twelve thousand dollars paid during the first, approximately the first week in April, 1959?

Mr. Galane: Your Honor, we could stipulate \$5,000 was given by Mr. Katleman to Mr. Haettel on April 1, 1959; \$5,000. was given by Mr. Katleman to Mr. Haettel on April 8, 1959.

The Court: For that purpose? For the purpose of transporting the troupe back to Paris?

Mr. Galane: That we won't stipulate.

The Court: Very well. This witness says—

Mr. Lionel: The witness says it was for that purpose.

By Mr. Lionel:

Q. Now, yesterday you testified—

The Court: Now, we have heard it. Ask him a question.

Mr. Lionel: I think in this case I have to, if your Honor will—

The Court: Direct his attention to the subject matter, but don't attempt to repeat his testimony.

Mr. Lionel: This is a matter—



The Court: That usually always leads to an argument. We have heard the testimony. Now, direct his attention to the testimony yesterday on the subject of so and so without trying to tell him what he testified.

[T. 1553, line 2, to 1554, line 2.] (Improper interjection by appellee's counsel. Court's interruption of cross-examination appears unwarranted.)

By Mr. Lionel:

Q. Is it not true that the \$2,000 a week was deducted because the Hotel loaned you the transportation?

The Interpreter: I don't understand the question. Could you kindly read the question?

Mr. Lionel: I will attempt to rephrase it.

The Court: Isn't that covered in the contract, gentlemen?

Mr. Galane: That is my understanding, sir.

The Court: Can't there be a stipulation on it, gentlemen?

Mr. Galane: I will offer a stipulation that the Hotel advanced \$17,000 prior to the start of the show on transportation, and there was an amortization taken out every week at the rate of \$2,000 per week out of the moneys for the La Nouvelle Eve show, and MCA took it out for that purpose. There is a letter in evidence—I am not sure, but Mr. Foley can help me—David Stein wrote and said, "We are holding the transportation money," a letter dated January 15, 1959, a week before the troupe left Paris.

Is that correct, counsel?

Mr. Foley: I am sure the stipulation is that the money was given to MCA and held by them for Bardy.

Mr. Galane: From the very beginning, and they took it out of the initial money.

Mr. Foley: That was the transportation to come to the United States.

Mr. Lionel: We offer the stipulation that the \$2,000 per week was taken out of the \$15,000 a week to reimburse for transportation advanced from Paris to the United States.

Mr. Galane: I won't accept—I think you should prove through Mr. Bardy how transportation was arranged, your Honor.

The Court: Whose obligation was it to pay the transportation of the troupe to this country?

Mr. Galane: Mr. Bardy.

The Court: Then the question is, did the Hotel not advance that sum?

Mr. Galane: In January. They took—

The Court: Very well. They advanced the sums to cover the transportation.

Mr. Galane: From Paris to Las Vegas.

The Court: And did they not thereafter, to repay themselves, deduct \$2,000. a week?

Mr. Galane: That is correct.

The Court: From what was due to whoever it is, this plaintiff or La Nouvelle Eve Corporation, \$2,000 out of those moneys?

Mr. Galane: That part is correct.

The Court: To pay themselves back for their advance?

Mr. Galane: That is correct.

The Court: Is that so stipulated?

Mr. Galane: That isn't what they are talking about.

The Court: I don't know, I am not passing judgment on that.

Mr. Galane: Up to this minute—

The Court: If you will quit making speeches and just reply to my question—

Mr. Galane: I stipulated up to that point.

The Court: Very well, both sides stipulate to that. What else is there about it to cover? What about the return transportation? Who was obligated to pay that?

Mr. Galane: Mr. Bardy.

The Court: Very well. Did he pay it? As I understand, he himself has just testified that he did not pay it, the Hotel did, and then when he says they still owe him \$18,600, he deducted the \$10,000 for transportation. Now, what else is there to be said about it at this point?

Mr. Lionel: If the Court pleases, I think he said the return transportation was deducted at the rate of \$2,000 a week. I would like to try to show—

The Court: That isn't what I understood him to say. You have already stipulated that the Hotel paid \$5,000, paid \$10,000 during the first ten days, as I recall it, of April, to cover this item.

Mr. Lionel: I am trying to prove that in his own figures he did not allow a credit for the \$10,000.

The Court: That is another matter. You can go into that.

By Mr. Lionel:

Q. Now, Mr. Bardy, did you have anything to do with sending your artists back from Las Vegas to Paris after April 7th?

The Interpreter: The date?

The Court: Can't all that be covered by stipulation, that he did not, he wasn't here, he didn't have anything to do with it? Isn't that the stipulation?

Mr. Foley: If the Court please, no. This is a matter at issue. I think the correspondence will show

Mr. Bardy was obligated to do the show and did not do it.

The Court: That is agreed, but the question is, as I understand—of course, it is ambiguous. I don't know what "having anything to do with it" means. Did he take the baggage to the airport, or did he pay, or what? What do you mean by the question? Perhaps we can get a stipulation.

[T. 1555, line 9, to 1559, line 2.]

(Court's interruptions for purpose of obtaining stipulations on matters which counsel had right to elicit by cross examination results in improper limitation of right of cross examination and results in confusion which detracts from cross examination and greatly hampers counsel's efforts)

By Mr. Lionel:

Q. The \$2,000 per week that was deducted by the Hotel, was that not deducted for the transportation from Paris to Las Vegas?

The Court: That is already stipulated.

Mr. Lionel: But I have this problem—

The Court: That is already agreed. Now, cover something else.

Mr. Lionel: If your Honor would hear me one moment. When I asked the witness about the \$10,000 he said that was paid for by the \$2,000 a week taken out of his money. You permitted the witness to testify he had \$18,600 coming. [T. 1560, lines 6-16.]

(The limiting and rushing of cross examination was unwarranted particularly in the light of the Court permitting appellee to testify to broad conclusions, without foundation, on direct, with respect to the \$18,600. See point VI supra.)

By Mr. Lionel:

Q. Do you know who sent them back, Mr. Bardy?

The Court: That assumes a fact not in evidence, doesn't it?

Mr. Galane: I will stipulate the performers took a trip from Las Vegas to Paris. The plane left July the 5th.

The Court: All of them?

Mr. Galane: That I don't know. They selected those to take a trip July 5th.

The Court: Who is "they"?

Mr. Galane: The El Rancho Vegas and the co-conspirators in this case, alleged co-conspirators. That is our position in this case.

The Court: Put your next question.

Mr. Lionel: I would like to ask the witness once again about that contract part, if I might, your Honor.

The Court: Yes. [T. 1561, line 18, to 1562, line 8.]

(Interjection and speech by appellee's counsel was deliberate misconduct)

By Mr. Lionel:

Q. Mr. Bardy, I show you Plaintiff's Exhibit 29 KP, and ask you if you know where these words "La Nouvelle Eve Corporation, Monte Carlo", came from on that exhibit? A. Because Mr. Conner succeeded in opening an account in the bank. The responsibility is the bank and Mr. Conner.

Q. Were these words placed on this exhibit by a rubber stamp?

The Court: It speaks for itself, doesn't it? [T. 1563, lines 8-16.]

(Unwarranted limitation by Court of cross examination)



Mr. Lionel: I am looking for a certain exhibit, your Honor. I don't have the number.

The Court: Have you about concluded?

Mr. Lionel: I would say I have about 30 or 40 minutes more, your Honor.

The Court: No. It is 1:00 o'clock now. We will take the recess, and boil it down to ten minutes. [T. 1564, line 25, to 1565, line 6.]

(Improper limiting and rushing of cross examination)

(By Mr. Lionel)

Q. Did any of your artists have AGVA contracts?

The Court: When?

Mr. Lionel: In Las Vegas in 1959.

The Court: Can't that be covered by stipulation, gentlemen? Must we take the time to use an interpreter to ask this witness that kind of question?

Mr. Lionel: I don't know that counsel would stipulate, your Honor.

The Court: Well, try and find out. Are you talking?

Mr. Lionel: I offer to stipulate that none of the artists paid by the show had AGVA contracts.

The Court: You mean when they came to America?

Mr. Lionel: At any time between—from the time the show started through April 7, 1959.

The Court: What do you mean by an AGVA contract, that they were not members of that union? Is that what you are saying?

Mr. Lionel: There is a contract form, your Honor, similar to the form of the contract—

The Court: Now, wait a minute. You are testifying.

Mr. Lionel: I am sorry.

The Court: It assumes facts not in evidence. I will sustain the objection upon that ground. You gentlemen should be able to stipulate to that. [T. 1575, line 3, to 1576, line 1.]

(Again the Court limits cross-examination by seeking to have counsel stipulate and then the Court sustains its own objection to a proper question.)

(By Mr. Lionel):

Q. When did you first hear that Aleta Morrison had no contract to stay after April 7, 1959?

The Court: Is that a fact in evidence?

Mr. Lionel: Yes, your Honor.

The Court: Very well. [T. 1578, lines 11-15.]

(Another interruption by the Court although no objection was interposed.)

By Mr. Lionel:

Q. Did you make any attempt yourself, Mr. Bardy, to take care of the situation at the El Rancho during the first week in April?

The Court: Just a moment. What does "take care of the situation" mean?

Mr. Lionel: I will withdraw the question.

The Court: Aren't you about run out by now? You have been cross-examining this witness for four hours or so. I have given you all the latitude I think you need. Haven't you about concluded? [T. 1592, lines 2-11.]

(Rushing of cross-examination.)

## APPENDIX B.

### Direct Examination of Roy Gerber.

(By Mr. Foley):

Q. What is your work with that corporation?

A. I am in charge of their live television department, West Coast.

The Court: Is that part of MCA?

The Witness: No, sir.

The Court: You are no longer connected with that group?

The Witness: No, sir.

The Court: How long has it been since you ceased your connection with MCA?

The Witness: Last July 23rd, sir.

By Mr. Foley:

Q. What is this new organization? A. This is an organization that has been in business for many years, General Artist Corporation.

The Court: General Artist Corporation? It is new to me. [T. 2352, lines 1-18.]

Q. Will you tell us what your initial contact was with regard to the La Nouvelle Eve show? A. The initial contact we received in the form of information, phone calls, notifications through the office of one of our senior vice presidents in New York, seeing a show in Paris that he thought was a most excellent show and something he thought would be a suitable show for us to book at various places around the United States, inside the United States, outside of the United States.

The Court: You mean that was before Stein had signed Bardy up in Paris?

The Witness: I don't know the exact date, sir. I should imagine that it followed David Stein's signing of—

The Court: Well, after the show came to Las Vegas you were representing MCA?

The Witness: I was.

The Court: You were representing the show?

The Witness: I was instrumental in bringing the show to Las Vegas, yes, sir.

The Court: You worked through Stein?

The Witness: Yes, sir.

The Court: And you were interested in lining it up for Katleman's hotel; is that it?

The Witness: Yes, sir.

The Court: So then the show came over?

The Witness: Yes.

The Court: In January of 1959?

The Witness: Yes, sir.

The Court: Can't we start there?

Mr. Foley: If your Honor please, there is certain background foundation material I think is important to the case. There are considerable efforts and transactions MCA undertook.

The Court: I am confident that that is so. You don't just call up on the phone and say, "Bring your show on over," or something like that. But I didn't assume it was in issue here.

Mr. Foley: That is correct, your Honor.

The Court: I assume it is conceded that there was a great deal of work done; that no one is questioning MCA—

Mr. Galane: We concede that up to April the 1st, 1959 MCA did its job. The complaint says that starting—

The Court: All right. Do you accept that stipulation?

Mr. Foley: Well, Mr. Bardy said from the witness stand, "What did they do to earn their \$1500?"

The Court: Counsel is willing to stipulate that MCA performed under its contract everything called upon them substantially up until April 1st—

Mr. Galane: Up until March 30, 1959.

The Court: Up to March 30, 1959. Will you accept the stipulation?

Mr. Foley: Yes, your Honor. There is certain background material necessary to go into. We can cut it short.

The Court: I don't want to preclude you. I was attempting to eliminate matters not in dispute.

By Mr. Foley:

Q. After the initial contact and the signing of the La Nouvelle Eve Revue to an agency contract, what did you do? A. I attempted to sell it in various places, various establishments throughout Las Vegas.

Q. How many establishments. A. Oh, I would say four or five might have been available.

The Court: An establishment in Las Vegas is a hotel?

The Witness: Yes, sir.

The Court: Is that the terminology? [T. 2353, line 10, to 2356, line 3.]

(By Mr. Foley):

Q. What did you do after Mr. Bardy arrived? A. We took Mr. Bardy to the El Rancho where Mr. Katleman had invited him. Well, we made a dinner date, and when I came back unfortunately Mr. Bardy couldn't go out with us. We were going out and see the various shows in town to let him see what Las Vegas was. I



think this was his first trip. I believe it was his first trip. To let him see the shows, the attractions there. Unfortunately we were delayed in the departure because we lost Mr. Bardy's pants.

The Court: Don't go into all that. He came over to look Las Vegas over, and I assume he saw it, didn't he?

The Witness: Well, we—

The Court: He may not have seen all of it, but he saw some of it, all he wanted to?

The Witness: Yes, he did, sir.

The Court: Then he went back to Paris?

Mr. Foley: If your Honor please, there are some important things in this area I would like to cover.

The Court: Very well.

The Witness: We missed the dinner show that evening. We were riding around during the evening showing him the various hotels. The second night we went out we went to the Lido show at the Stardust, and it was following that show—the table comprised of myself, Miss Pivornick, Monsieur Bardy and Jerry Nolan—it was following that show we went back to the El Rancho, and Mr. Bardy, through Miss Pivornick, advised me that he was very unhappy.

Mr. Galane: If your Honor please, there is a document in evidence, and we will stipulate that MCA has a memorandum that Mr. Bardy was very upset that he could not be as good as the Lido show, and it is an MCA memo. If they will wait a minute—

Mr. Foley: We don't need the memo.

Mr. Galane: I will stipulate when Mr. Bardy first came to Las Vegas and saw the Lido he was very concerned that he would not have the ability to produce a

show competitive with the Lido de Paris, and, I think, in fact, he wanted to back off the deal.

The Court: You mean the facilities in Las Vegas?

Mr. Galane: Yes.

The Court: You mean the facilities?

Mr. Galane: Under the facilities at the El Rancho Vegas Hotel.

Mr. Foley: That is not the question. I would like to proceed with the witness uninterrupted.

The Court: Proceed. [T. 2357, line 14, to 2359, line 10.]

By Mr. Foley:

Q. Mr. Gerber, would you state what you did with reference to the specialty acts after the discussions?

The Court: Now, is that necessary?

Mr. Foley: It is important to the case, yes, your Honor.

The Court: No one disputed that MCA did their work as far as earning their commissions up to the point of the alleged conspiracy is concerned.

Mr. Foley: I agree, your Honor, but there was a specialty act changed.

The Court: Very well.

Mr. Foley: As of April 8th, your Honor, and this is foundation for that. [T. 2434, lines 2-14.]

(By Mr. Foley)

Q. What did MCA do with it? A. Advanced it to Icelandic.

The Court: Isn't that the sum that was supposed to be amortized at \$2,000 a week?

May there be a stipulation as to that?

Mr. Galane: Yes, we had stipulated to that earlier in the trial.

Mr. Lionel: I think the amount was \$19,000, your Honor, and I would stipulate to that amount.

Mr. Galane: That is what David Stein's letter to Mr. Bardy says, is \$19,000. I think counsel for the Hotel is correct. That is Exhibit 106.

The Court: Well, that \$19,000 was for the round trip, wasn't it?

Mr. Galane: Yes, or at least on account of the round trip.

The Court: Well, Mr. Foley just read the letter from Icelandic, Exhibit M—

Mr. Foley: MS, your Honor.

The Court: —MS, to that same effect, as I recall the figures. But the figure of \$12,000, whatever it is, is included in the \$19,000. The figure of \$12,000 was for the coming over trip; is that correct, from Paris?

Mr. Foley: Yes, your Honor.

The Court: And the return was estimated at what, at seven thousand some odd dollars?

Mr. Foley: Originally the point being here that there is some additional expense, and the total bill for transportation was \$21,442.32, according to Icelandic.

The Court: Very well. Of which twelve—whatever that figure is—twelve thousand odd for the expense of the transportation coming over is included in the total amount that was to be amortized at the rate of \$2,000 a week for the entire engagement.

Mr. Foley: For the initial run of the show, your Honor.

Mr. Lionel: No, your Honor.

The Court: Initial run of how many weeks?

Mr. Foley: Ten weeks.

The Court: Well, that would be two thousand a week for ten weeks.

Mr. Foley: I think actually it was mentioned—the \$12,000 was because of a feature in the initial contract whereby Mr. Katleman, if he chose to, could cancel at the end of six weeks. If he did not choose to cancel, the show would run an additional four weeks for a period of ten.

The Court: Let's get the transportation straightened out.

Mr. Galane: Your Honor, it was \$19,000.00.

The Court: That is what Icelandic estimated the round trip to be; is that correct?

Mr. Foley: Yes.

The Court: Now, of which \$12,000 was incurred coming over; is that it?

Mr. Galane: That is correct.

The Court: Coming to Las Vegas from France?

Mr. Galane: That is correct.

The Court: That was to be along with the return engagement amortized by deducting from Bardy's share, Bardy's payment each week, \$2,000?

Mr. Galane: That is correct. May I also add, according to this letter, the Hotel posted \$19,000 with MCA. They escrowed it.

Mr. Foley: I don't think that is correct. I have other exhibits.

The Court: Why go into all that? If we can stipulate to it, let's get it down where we can understand it. You don't have to prove it. That is the purpose of a stipulation.

Mr. Lionel: Except from the defendants I represent, your Honor, there is an important point involved that

I will attempt to show on cross examination of this witness.

The Court: May it be stipulated here as I have stated here that that was the arrangement?

Mr. Galane: Plaintiff so stipulates.

The Court: When I say, "Paid to Bardy," paid to whoever is entitled to the money under the contract.

Mr. Lionel: Yes, sir, your Honor. If I may clarify that stipulation, your Honor. May I say that the Hotel advanced \$19,000, actually, and gave it to MCA to handle with respect to the transportation, and that amount was to be amortized by the show over the period that the show ran.

Mr. Foley: That is incorrect. I will not accept that. I believe it is incorrect.

The Court: Well, probably the Hotel gave it to MCA, MCA gave it to the union.

Mr. Galane: If your Honor please, the \$10,000 to the union had nothing to do with this.

The Court: I am not talking about the \$10,000 to the union.

Mr. Galane: We will accept the stipulation that the Hotel gave \$19,000, which, according to David Stein, was held by MCA for transportation for the benefit of Mr. Bardy.

The Witness: May I say something?

Mr. Foley: That is not correct. That was Mr. Stein's position originally.

By Mr. Foley:

Q. How much was paid by Mr. Katleman towards the transportation money coming over? A. \$12,000.

Q. Was any amount— A. Twelve thousand, round figures. \$12,000, sir.



The Court: Even money?

The Witness: Even money.

By Mr. Foley:

Q. And that is the \$12,000 mentioned in the exhibits that I had read? A. Yes, sir.

The Court: And that \$12,000 was taken out at the rate of \$2,000 a week during the first six weeks of the run?

The Witness: Correct, sir.

The Court: That was the initial engagement?

The Witness: Yes, sir.

The Court: From the end of January until about the end of March?

The Witness: No, the beginning of March, I believe it would be, sir.

The Court: Beginning of March?

The Witness: Yes, sir.

The Court: Then the option was exercised for—

The Witness: It was a reverse option. It was a situation of the show being booked for ten weeks. If the show were to be cut back for six weeks, there was an additional payment of \$10,000 to be made to Mr. Bardy so that would amortize his expense of transportation.

The Court: The six weeks would cover the 12,000?

The Witness: That is right.

The Court: And that was taken out?

The Witness: Yes, sir.

The Court: So we can forget about that as far as the accounting is concerned, can't we?

Mr. Galane: Yes. Plaintiff agrees to the amortization rate.

Mr. Foley: I would like to have Mr. Gerber now read what is in evidence as Plaintiff's 98.

The Court: Well, now, on this going home business, the difference between the 12,000 and the 19,000 odd dollars, what became of that \$7,000?

Mr. Foley: Well, your Honor, according to this exhibit, the \$7,000 became an additional amount because there was additional transportation arranged according to this exhibit, so rather than the nineteen thousand, the total cost of transportation and transporting of costumes became \$21,442.32.

The Court: That was the round trip?

Mr. Foley: The total round trip.

The Court: All right. We have 12,000 put up for the coming over. Now, what about this statement that nineteen odd thousand dollars was put up?

Mr. Foley: That is revised by this. That is the total cost. The nineteen thousand, if the Court please, was apparently just the transportation of the troupe itself, round trip.

The Court: Very well. Was nineteen odd thousand dollars put up by the Hotel?

Mr. Foley: No. Originally twelve.

The Court: And that is all?

Mr. Foley: That is all.

The Court: So all the Hotel ever put up was twelve to bring them over, which was amortized out?

Mr. Foley: That is correct.

The Court: And the two fives, totalling ten, to send them back?

Mr. Foley: Yes.

The Court: Is that right?

Mr. Foley: I understand now.

The Court: Is that agreed?

Mr. Lionel: Stipulated.

Mr. Galane: So stipulated.

The Court: And the only part that was amortized out was the twelve—twelve thousand; is that correct?

Mr. Lionel: Yes, your Honor.

Mr. Galane: So stipulated.

Mr. Foley: Yes, your Honor.

The Court: So the way the round trip stands, the Hotel advanced \$10,000 to the union allegedly for that, according to the evidence.

Now, does Mr. Bardy contend that he advanced some, too?

Mr. Galane: Yes, sir, four thousand is his out-of-pocket loss, from my information.

The Court: You mean the airline was overpaid?

Mr. Galane: No, the airline had already been paid by him.

The Court: You mean the airline was overpaid?

Mr. Galane: Maybe. I can only speak for Mr. Bardy's out-of-pocket disbursements.

The Court: You must have looked into this. Let's get it straight. Was the airline overpaid?

Mr. Galane: This I don't know, sir.

The Court: Has anyone looked into it?

Mr. Lionel: I have no evidence otherwise.

The Court: It is estimated to be twenty-two thousand odd dollars, the round trip?

Mr. Foley: Not quite that. It was twenty-one thousand four hundred and forty-two dollars—

The Court: Well, twenty-one thousand odd dollars. Now, the Hotel put up twelve and then the ten, which would be twenty-two. Do you expect to offer evidence that Mr. Bardy put up something too?

Mr. Galane: Yes, sir.

The Court: The union testified that all of the ten went to the Icelandic.

Mr. Galane: Yes, sir.

The Court: Isn't that the testimony of Mr. Haettel?

Mr. Galane: I think they said all but about \$900.00, which they still have in the bank.

The Witness: This cost was reduced in some way, because not everybody that went over with the troupe ever went back.

Mr. Galane: If your Honor please, it should also be pointed out that they didn't go back in one trip. Ten were cut out of the cast.

The Court: That appears in the evidence.

Mr. Galane: I think that affects the cost to some extent.

The Court: In any event, the Hotel put up \$22,000 for transportation and got back twelve of it out of the amortization, and of the other ten, 9,900 of it the union says was actually expended for transportation, is that correct?

Mr. Lionel: I think it was about 9100 of the ten.

The Court: Very well, approximately 9100. That is it, \$900 the union still has of the money?

Mr. Bergin: Approximately that amount, your Honor.

The Court: Can't we find out exactly? You aren't going to ask this jury to render a verdict for approximately so much money. I can't render a judgment for approximately so much money; have to be a definite amount.

Mr. Bergin: But the union isn't a defendant in this matter, your Honor. That would be something for the plaintiff and the union to settle, not any of the defendants herein.

Mr. Galane: If your Honor please, our position is the money didn't get to Mr. Bardy; the Hotel is indebted on the contract.

The Court: That will be the plaintiff's position. We should know the precise amount that was expended. Can't we find that out? It seems to me you could stipulate to those things.

Proceed. [T. 2444, line 8, to 2453, line 25.]

By Mr. Foley:

Q. Mr. Gerber, then when did the rehearsals start?

A. Rehearsals started the next afternoon. The troupe arrived quite late at night, and it was decided that the rehearsals would not start until approximately two o'clock the next afternoon.

The Court: Mr. Gerber, just answer the question and if you feel it has to be explained—I imagine you could talk for a week on all the things that happened in connection with that entire matter, but let's not do it unless it is in controversy here.

The Witness: I thought I did answer it.

The Court: Well, then quit. You answered the question all right, but you keep going on and on and on, and it is all very interesting, but I don't think it is in controversy here.

By Mr. Foley:

Q. During the rehearsal, were there any changes made in the manner of the presentation of the show? [T. 2465, line 10, to 2466, line 2.]

By Mr. Foley:

Q. Were changes made in the revue during the rehearsal? A. Yes. They were—

The Court: You weren't asked what they were.

The Witness: Yes, sir. [T. 2469, lines 6-10.]



(By Mr. Foley):

Q. Was there any change in the billing?

The Court: In the advertising? [T. 2473, lines 2-3.]

Q. Was there a subsequent money bill sent for that?

The Court: By whom? [T. 2473, lines 18-20.]

A. There were several conversations that I had with Mr. Haettel with regard to the AGVA thinking on this situation. After many of these conversations and similar conversations resulting after several conversations with Mr. Bardy and Mr. Holmes, I recommended and advised that they sit down and write a letter to AGVA in New York stating their case, stating that over the period of years Mr. Bardy had hired many American acts for appearances at La Nouvelle Eve and—

The Court: You mean in Paris?

The Witness: In Paris, yes, sir. I believe the term “reciprocity”—

By Mr. Foley:

Q. Reciprocity? A. Yes, came up in the conversation, and it was decided that this would be a good word to use in the letter to AGVA. I had hoped that in this manner possibly something that had not previously been called to Mr. Bright’s attention would be brought out. The intent of which was to obtain permission and therefore be able to continue booking the show.

The Court: You mean to have it on tour? Is that what you mean?

The Witness: Yes, sir. [T. 2481, line 3, to 2482, line 2.]

Q. I believe those are shown in the exhibits which I have just shown to the jury, but would you state what particular contacts you made?

Mr. Galane: Objected to, if your Honor please, unless counsel makes it clear. He is talking about firm bookings.

Mr. Foley: I am not talking about firm bookings.

Mr. Galane: That is the question.

Mr. Foley: The question is what contacts were made.

The Court: What efforts were made to book the show on tours; is that it?

Mr. Foley: That is correct, your Honor.

The Court: Just tell us briefly; you tried to get it in New York or wherever you did. Don't tell us all the details. You tried to get bookings in the following cities.

The Witness: I can't answer the question briefly, your Honor.

The Court: You don't have to tell what you did. Did you try to get it in Miami?

The Witness: Miami.

The Court: Chicago?

The Witness: Yes, sir.

The Court: Cincinnati?

The Witness: Yes, sir.

The Court: New York?

The Witness: Yes, sir.

The Court: Philadelphia?

The Witness: Yes, sir.

The Court: And numerous other places?

The Witness: Yes, sir.

The Court: You have answered it.

What is the next question? [T. 2482, line 13, to 2483, line 19.]

The Court: That portion of the answer will be stricken.

The Witness: The discussion that took place with Mr. Bardy at that point, I believe—I am not sure, I would have to check the dates—that we had not as yet received an answer from AGVA, and in my conversations with Mr. Bardy it was discussed that it would be to his advantage if we were to prolong the engagement at the El Rancho and, therefore, possibly wait until the answer had arrived from AGVA.

The Court: Exhibit 472 states that the first two shows nightly shall be abbreviated versions of the present program and the third show shall be equal.

The Witness: That is right.

Mr. Galane: If your Honor please, isn't it—I may be wrong—yes, forgive the interruption. That is the contract.

The Witness: The reason for that is, as I explained, there was a star Mr. Katleman had not been able to push back.

The Court: What do you mean “push back”? [T. 2487, line 10, to 2488, line 4.]

The Court: This letter was written to whom by whom from where?

The Witness: I said that, sir; from Rene Bardy to me in Las Vegas from Las Vegas.

The Court: And the date of it?

The Witness: Dated March the 6th.

The Court: While Mr. Bardy was in Las Vegas?

The Witness: Yes, sir.

The Court: Did he hand it to you? [T. 2493, lines 3-11.]

The Witness: Yes, there was conversation which brought forth Mr. Bardy's statement in his letter. I told him that if—

The Court: Now, you don't have to go into that. You weren't asked that.

Mr. Foley: I would like to have the conversation, your Honor.

The Witness: I told—

The Court: The plaintiff wrote the letter, didn't he?

Mr. Foley: What performers was he talking about? That is what I want to show by this means.

Mr. Galane: If your Honor—

The Court: All of them, wasn't he?

Mr. Foley: He certainly did.

The Court: Does not the letter speak for itself?

Mr. Foley: Your Honor, here is the problem—

The Court: You don't need to argue the case. If you will finish the evidence, I will let you gentlemen argue this case. I have never seen lawyers more anxious than you are. Let's finish the evidence so you can get to it.

Mr. Foley: I am trying to show knowledge of the plaintiff of certain things which he claims he didn't have knowledge of, and he blames us for not giving him knowledge.

The Court: Has he so testified?

Mr. Foley: Yes. He testified in this case he didn't know about the absence of these performers.

The Court: You haven't come up to that. You are at March 6th.

Mr. Foley: This is when Mr. Gerber told him about it.

The Court: If you move up to April—

Mr. Foley: It was March 6th when Mr. Gerber told him these things.

The Court: Very well. He told the plaintiff. Lay the foundation. Ask him what he told him about the performers.

Mr. Foley: That is the question. [T. 2498, line 1, to 2499, line 12.]

(By Mr. Foley):

Q. Any other conversation—

The Court: Did he tell you he was doing that?

The Witness: He said he was going on.

Q. He told you he, a man, was going to sing, "Oh, My Man I Love You So."?

The Witness: He didn't say that; he said he was going to sing her numbers. That was one of the numbers.

The Court: Do you want the jury to understand he was going to sing "Oh, My Man, I Love You So"?

The Witness: At that point anything was possible, sir. [T. 2517, lines 6-16.]

(By Mr. Foley):

A. The series of meetings brought forth the fact that the show that was now appearing at the El Rancho, which was Jack Wallace and a girl singer, was causing quite a bit of loss of business. Mr. Katleman had been bitterly complaining about that to me for that three-day period we were discussing. He implied to me that if I could work out a deal whereby the cost of the continuation of the show could be reduced so he might possibly recoup some of his loss now going on, he might be willing to do so.

The Court: You call it Jeff Wallace?

The Witness: Jack Wallace.

The Court: I thought Lewis went in there.

The Witness: No, Jack Wallace was the record act, sir.



The Court: Didn't Lewis go in there on the night of the 8th?

The Witness: To tell you the truth, I don't know, sir. I was backstage.

Mr. Foley: Maybe I can clear this up with a leading question.

By Mr. Foley:

Q. Was it Monique Van Vooren? A. Yes, sir.

The Court: Wasn't Lewis there?

The Witness: I honestly could not say that he was, sir.

The Court: Didn't your company represent the show that went on that night?

The Witness: No, sir.

By Mr. Foley:

Q. Who represented Monique Van Vooren?

The Court: It wasn't MCA?

The Witness: Jack Wallace was.

The Court: So you represented a part of the show?

The Witness: I represented Jack Wallace.

The Court: These performers were members of this same union that Mr. Haettel represented? [T. 2529, line 1, to 2530, line 14.]

By Mr. Foley:

Q. Talk a little louder, if you would, please.

The Court: Don't talk to me. Mr. Haettel wasn't concerned about it, was he?

The Witness: He was most concerned.

The Court: His members were working, whoever was on the stage?

The Witness: I think whether his members were working or not was not the matter of prime concern.

The Court: Was he arguing, trying to get the La Nouvelle Eve on there?

The Witness: Yes, sir.

The Court: Were the other members of the union trying to go on, the substitute show? Did they hear him arguing to try and keep them out of work?

The Witness: No, sir, I don't believe that they were present at the point of argument. Miss Van Vooren or—

The Court: You said there was a great deal of panic?

The Witness: There was, yes, sir. This was 8:15, and at 8:15 the show started, people on stage, people coming on—

The Court: As far as you know, did the members of the union who were waiting to substitute to make some money hear Haettel arguing for somebody else to go on and make some money?

The Witness: I couldn't make that statement. No, sir, I couldn't.

The Court: So, in other words, the people who were waiting to go on, the show that finally went on, didn't hear all this panic, then?

The Witness: They might have, and they might not have. I don't know. I couldn't say whether they did or not.

One of the members of the group who was booked there with Jack Wallace probably was standing around on that side of the stage.

The Court: How did you put this man Wallace on?

The Witness: This man Wallace has done an act by himself, just as George Matson.

The Court: But he was part of the La Nouvelle Eve Show?

The Witness: No, he wasn't sir; he was under contract to the El Rancho Vegas as were the other specialty acts.

The Court: He was under contract to MCA?

The Witness: No, I am saying an employment contract.

The Court: But you represent him?

The Witness: Yes, sir.

The Court: And you put him in the La Nouvelle Eve show? [T. 2531, line 1, to 2533, line 16.]

(By Mr. Foley):

The Witness: MCA represented Francis Brunn, Andre Phillippe, MCA represented Jack Wallace. Those were the three specialty acts MCA represented. I drew the contracts for them.

The Court: You say that they were employed directly by the Hotel? [T. 2535, lines 7-12.]

(By Mr. Foley):

Q. When the La Nouvelle Eve did not work on April 8th, Jack Wallace performed in the substitute show?

A. He had done nothing wrong. He had a job to do, and he did it.

The Court: But it was your position that no one had done anything wrong; right?

The Witness: Right.

The Court: You were representing all these people?

The Witness: Yes. He had a contract with the Hotel to perform.

The Court: You wanted this show to go on?

The Witness: Yes, sir. But how could I say to him, "You cannot go on"? He had a contract to perform. He was performing at the Hotel for the Hotel.

By Mr. Foley:

Q. HE was under contract with the Hotel? A. Yes, sir.

Q. Now—

The Court: What about the other specialty acts? Weren't they under contract? [T. 2536, line 10, to 2537, line 4.]

A. The proposition was finally made to Mr. Holmes and to Mr. Regis that Mr. Katleman would pay \$2,000 per week to Mr. Bardy, and that is what Mr.—

The Court: And the show would go on without these two girls?

The Witness: Yes, sir.

The Court: Janine Caire and Aleta Morrison? [T. 2538, line 25, to 2539, line 6.]

Mr. Foley: May I read these exhibits, your Honor?

The Court: Who was to provide these replacements under this new \$2,000 Bardy arrangement?

The Witness: Well, under the contract—

The Court: No, no. I didn't ask you that. I asked you who was to provide—you said they were making a new deal now.

The Witness: Yes, sir.

The Court: Well, did I understand you to say that Katleman said, "Well, if Bardy will accept \$2,000 instead of five the show could go on;" is that right?

The Witness: That's right.

The Court: All right. Who was to provide these replacements? You say it was to go on without Janine Caire, and what is the name, Aleta Morrison?

The Witness: Aleta Morrison.

The Court: So there had to be two substitutes, replacements, for them. Who was to provide them under the new arrangement?

The Witness: Under the new arrangement Mr. Bardy was just receiving a fee; everyone else was now under contract to the El Rancho.

The Court: That isn't the question. My question is who was going to pick these replacements, Katleman or Bardy?

The Witness: It was not Bardy at this point; it was either Katleman or Charley Henschis, or if I knew of someone who would fit the show.

The Court: In other words, you had no agreement about that?

The Witness: No. They would be replaced.

The Court: By whomever?

The Witness: The best we could find.

The Court: Whoever could find them?

The Witness: Anybody involved.

The Court: MCA?

The Witness: If I could find them it would be my booking, I would make a sale. [T. 2539, line 22, to 2541, line 8.]

(By Mr. Foley)

Q. Well you tell us when you hired him and for what period and for what purpose? A. I don't remember the exact date when he was hired. I know that the Charley Ballet opened as part of a show at the El Rancho. The Charley Ballet at that point was a series of three production numbers.

The Court: Was MCA representing it? [T. 2550, line 23, to 2551, line 4.]

The Court: Let's ask the witness. He ought to know.

Was anything ever paid Bardy under that so-called extension arrangement?



The Witness: I think it was being paid to AGVA. I don't know exactly.

The Court: No, no, I am talking about anything for Bardy.

The Witness: I don't know. At that point—

The Court: You were representing him. Did you collect any of the money? Let's get at it this way: From the time the show opened until this trouble came up on April 8th, you had collected all—that is, MCA had collected—all the money that was paid for this show; is that right?

The Witness: Yes, sir.

The Court: That is, paid to Bardy or—

The Witness: The check was made payable to MCA.

The Court: Made payable to MCA. So MCA took their 10% out?

The Witness: Right.

The Court: And, I assume, sent the rest to Bardy?

The Witness: No, sir. All I did each week was endorse the check, and Peter Holmes would endorse the check and they would make their payroll.

The Court: How did you get your 10%?

The Witness: It was a separate check each week. The 10% was a separate check.

The Court: From whom?

The Witness: From El Rancho.

The Court: In other words, El Rancho paid you direct, the Hotel paid you direct?

The Witness: They deducted the commission from the figure and paid me direct, yes, sir.

The Court: So you got your 10% on that?

The Witness: Yes, sir.

The Court: Now, did you ever get any more 10% out of this deal?

The Witness: No. As of April 15th, which I believe—

The Court: I am talking about after April 7th.

The Witness: April 7th there was no—

The Court: You see, this new contract was supposed to start April 8th, wasn't it?

The Witness: Yes, sir.

The Court: Where Bardy was to get \$5,000 a week?

The Witness: Yes, sir.

The Court: Were you to get 10% of that?

The Witness: No, sir.

The Court: Weren't you?

The Witness: No, sir.

The Court: Oh, no, I see, the commission was to be paid by the Hotel?

The Witness: Yes, sir, but not on the 5,000.

The Court: Whatever your commission was on that. Did you have a commission of so much?

The Witness: Yes, a commission on the cost of the show excluding the 5,000 figure.

The Court: All right. Now, my question is, did you ever get anything further from the hotel, MCA get anything for anything that transpired after April 7th?

The Witness: As of the week starting April 15th we received—

The Court: I mean, did you receive anything—

The Witness: Yes, MCA received a commission through April 7th.

The Court: Yes. Now—

The Witness: The new contract—

The Court: That was handled in the same way you have described?

The Witness: Yes, sir.

The Court: The Hotel paid MCA direct, you took the check and gave it to Holmes, Holmes banked it, and so forth?

The Witness: Right.

The Court: Now, after April 7th, how did MCA come out?

The Witness: There was no payroll the following week. The only money that exchanged hands the following week was the half payment.

The Court: Then beginning April 15th there was a show?

The Witness: Yes, sir.

The Court: And what was that show?

The Witness: That show was the 20 some odd people.

The Court: What was it called—

The Witness: It was still—

The Court: La Nouvelle Eve?

The Witness: La Nouvelle Eve.

The Court: How long did it run, June 2nd?

The Witness: It ran through June 2nd.

The Court: Did MCA get from the Hotel 10%.

The Witness: No, sir, they received 10% of the cost—the amount is approximately \$674. a week.

The Court: Well, my point is, after April 7th there was no check for Bardy any more, no check which you gave to Holmes to deposit in the bank account; is that it?

The Witness: There was—I believe there are some papers somewhere—

The Court: Can't you agree on this, gentlemen?

Mr. Galane: To my knowledge, your Honor, Mr. Bardy never got a cent after April—

Mr. Foley: I think this is a matter of Mr. Frank Watts' records, perhaps. I really don't know, because at this point the other man came in shortly afterwards, Mr. Broder, and was concerned about the accounting. Mr. Gerber simply went ahead—

The Court: Can we agree that after April 7th was there any money paid directly to Bardy or Holmes?

Mr. Galane: Your Honor—

The Court: You were handling the checks?

The Witness: I know it.

The Court: Did you handle any more checks that went to Holmes?

The Witness: Yes, I did. They were payroll checks paid in the same manner as the show had been done previously up to that point. The check would come through for X amount of dollars, certain charges would be made against those checks, room, food—

The Court: Who handled that?

The Witness: I would handle it, endorse it. A check would be deposited by Holmes and Connors and the payroll handled—

The Court: Do you know whether Bardy got anything?

The Witness: No. What happens, every Wednesday or Tuesday night Harold Connors would meet with Watts and they would establish what the payroll was that week, the veracity and amount of check, I assume, to be correct, with Mr. Connors going over it. All I would do was take the check, endorse it, and they would carry on as they always had. There were always deductions against the check.

The Court: And you got your 10%?

The Witness: No, I did not, sir. I only received commission on the amount of cost of the show.

The Court: That is what I am talking about.

The Witness: Well, in other words, the cost of the performers working there at the time; no commission on the \$2,000 whatsoever.

The Court: Well, was the \$2,000 ever paid? That is what I am getting at.

The Witness: I don't know.

The Court: Did you ever hear it was paid?

The Witness: Whether it was paid in the check or not, I cannot establish.

The Court: But you looked it over, and that was part of your job?

The Witness: No. Mr. Connors would work over the work sheet with Mr. Watts at the Hotel.

The Court: You were representing MCA at that time?

The Witness: Yes, sir.

The Court: Did you think you were still representing Bardy?

The Witness: Yes, sir.

The Court: Did you ever ask if there was anything in that check for him?

The Witness: There was nothing to lead me to believe there wasn't. If there were deductions being made, I assumed they would be straightened out by Watts and Mr. Connors.

The Court: Well, I assume it will come out sooner or later. [T. 2553, line 16, to 2559, line 23.]



# APPENDIX. C.

## Plaintiff's Exhibits

<u>No.</u>	<u>Identified At Page No.*</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected**</u>
13				
14		71	74	
16		1014	1014	
18		1014	1015	
20		1015	1015	
21		74	75	
22		1015	1015	
26		1372	1372	
28		1015	1016	
29		1016	1016	
30		1653	1653	
32		1016	1016	
44		1104	1104	
45		1017	1017	
47		75	75	
52		75	75	
56		178	179	
62		1017	1017	
57		1032	1032	
66		1017	1018	
68		1652	1652	
70		75	76	
72		76	76	
73		100	102	
75		106	107	

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\*Many of the exhibits were not identified, and were marked prior to trial and court sessions.

\*\*Only admitted exhibits are part of the record.

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
75 A 1 through				
75 A 18		181	181	
76		108	109	
82		109	109	
83		109	110	
86		110	110	
86 A		110	112	
87		112	113	
88		1644	1645	
89		113	113	
90		125	125	
90 A		1260	1261	
90 B		1262	1262	
91		1031	1031	
93		1165	1165	
94		76	77	
95		126	126	
96		879	879	
97		138	139	
98		126	126	
105		703	706	
100		1969	1971	
101		1969	1971	
102		1969	1971	
109		177	178	
129		989	919	
141 A		494	495	
141 B		494	495	
141 C		494	495	
150		184	184	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
151		187	187	
152		2701	2702	
153		187	188	
156		1167	1168	
157			1845	
159		188	188	
162		188	189	
164		189	189	
165		189	189	
166		190	190	
167		190	190	
170		196	198	
179		1858	1858	
183		1293	1294	
185		1281	1283	
186		1368	1370	
191		1368	1370	
193		1368	1370	
196		1368	1370	
198		1373	1373	
200		1314	1315	
201		1314	1315	
205		1368	1370	
207		1368	1370	
209			1206	
211			1206	
212			1206	
213			1206	
214			1206	
215		507	507	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
216			1206	
217			1206	
219		1196	1197	
220			1206	
222		375	375	
225		382	383	
226		383	383	
229			1206	
231			1206	
232			1206	
234			1206	
235			1206	
238		385	385	
239		383	384	
240		384	384	
242			1206	
243		440	440	
244			1206	
247		1222	1222	
250		394	395	
251		394	395	
252		394	395	
253		394	395	
254		394	396	
255		394	396	
256		394	396	
260			1206	
261		394	396	
262		394	396	
264		438	438	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
265			1206	
269			1206	
270		441	441	
271		441	441	
272			1206	
273			1206	
275		910	911	
282		457	458	
284			1206	
292		1368	1370	
294		739	740	
295		1368	1370	
298		1231	1232	
304		1370	1370	
305		1231	1232	
306			1548	
309		1371	1371	
324		532	533	
326		1370	1370	
327		1370	1370	
333		532	533	
334		548	549	
335		555	555	
335 A		545	546	
336		1372	1372	
342		532	533	
343		1327	1328	
347 A		544	545	
364		2699	2700	
368 A		546	547	
378		1373	1373	



<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected:</u>
384		971	981	
406		767	767	
415		1646	1647	
419		1646	1648	
421		1646	1647	
426		1646	1647	
438		1646	1647	
439		1646	1647	
447	83			
448		128	128	
449		128	129	
450		129	129	
451		130	130	
452		130	130	
453		130	131	
454		131	131	
455		131	132	
456		132	132	
457		133	133	
458		133	134	
459		134	134	
460		134	135	
461		135	135	
462		135	136	
463		136	136	
464		136	136	
465		136	137	
466		138	138	
467	211			

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
468		234	235	
469		235	236	
470		236	236	
471		236	237	
472		238	238	
472 A		1263	1264	
473		238	238	
474		357	358	
475		358	358	
476		365	366	
477		375	376	
478		389	389	
479	392			
480	379			
481 A	412			
481 B	412			
481 C	409			
482		438	438	
483		443	444	
484		444	445	
485	460			
486	464			
487		488	489	
488		508	510	
489		605	606	
490		609	610	
491		611	611	
492		611	612	
493		612	612	
494		612	613	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
495		613	613	
496		613	613	
497		613	614	
498		614	614	
499		614	615	
500		615	615	
501		614	615	
502	620			
503	634			
504		670	671	
505		675	676	
506		685	686	
507		686	686	
508		686	686	
509		687	687	
510		687	687	
511		720	720	
512		511	512	
513	728			
514	728	738	738	
515	729	738	738	
516	730	738	738	
517	730	738	738	
518	730	738	738	
519	731	738	738	
520	731	738	738	
521	732	738	738	
522	732	738	738	
523	732	738	738	
524	732	738	738	
525	732	738	738	

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected<sup>1</sup></u>
526	733	738	738	
527	733	738	738	
528	733	738	738	
529	735	738	738	
530	735	738	738	
531	828	829	830	
532	857	859	859	
533	857	859	859	
534	887			
535	916			
536	1020			
537	1020			
538	1021			
539	1021			
540	1033			
541	1035			
542	1049			
543	1131			
544	1177	1178	1182	
545	1178	1178	1182	
546	1432			
547		1654	1655	
548		1814	1815	
549	1850			
550	2163			
551	2338			
552	2416			
553 A	2583			
553 B	2583			
553 C	2583			

<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
554	2609			
555		2615	2616	
556		2642	2642	
557		2675	2675	
558	2682			
559		2708	2708	
560		2708	2708	
561		2718	2719	

### Defendant Hotel's Exhibits

A	1447	1448
B	1458	1458
C	1470	1470
D	1500	1500
H	1536	1537
I	1584	1585
J	1990	1995
K	2342	2342
M	1875	1876
M-1	1878	1878
N	1901	1902
P	2567	2567
Q	2572	2572

### Defendant MCA's Exhibits

DR	2399	2399
DW	2402	2402
EJ	327	328
EL	2404	2404
LC	1596	1596



<u>No.</u>	<u>Identified At Page No.</u>	<u>Offered At Page No.</u>	<u>Received At Page No.</u>	<u>Rejected</u>
LW		703	706	
MP		2401	2401	
MQ		2401	2401	
MR		2402	2402	
MS		2404	2404	
MT		2403	2403	
MU		2403	2403	
MV		2403	2403	
MW		2404	2404	
MX		2411	2411	
MY		2411	2412	
MZ		2414	2415	
NA		2415	2415	
NB		2400	2400	
NC		2547	2548	
NC-1		2400	2401	
ND		2512	2512	
NE		2525	2525	

**Defendant Gregory's Exhibits**

A	1640	1641
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**Defendant Haetel's Exhibits**

A	2133	2134
C	2124	2124
D	2135	2136



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LODGED

JAN 21 1966

WILLIAM E. WILSON, Clerk

RAYMOND R. BEASLEY,

Appellant,

v.

NO. 20237

PETER J. PITCHESS, SHERIFF,  
COUNTY OF LOS ANGELES, STATE  
OF CALIFORNIA,

Appellees.

APPELLEES BRIEF

EVELLE J. YOUNGER  
District Attorney of Los Angeles  
County, State of California

By

HARRY WOOD  
Chief, Appellate Division

ROBERT J. LORD  
Deputy District Attorney  
Attorney for Appellees

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26-3888

Attorney for Appellees

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RAYMOND R. BEASLEY,

Appellant,

v.

PETER J. PITCHESS, SHERIFF,  
COUNTY OF LOS ANGELES, STATE  
OF CALIFORNIA

Appellees.

NO. 20237

APPELLEES BRIEF

INTRODUCTION

This Brief is filed on behalf of the Sheriff of the County of Los Angeles, State of California, and of The People of the State of California, as a Real Party in Interest by Evelle J. Younger, District Attorney of the County of Los Angeles, State of California.

We will first discuss whether Appellant's rights under the United States Constitution have been infringed; then we will consider the basic facts and proceedings in the State Courts in order to show that there was no lack of due process accorded the petitioner in these courts either.





On November 15, 1962, the petitioner was indicted by the Grand Jury for selling marijuana on or about August 3, 1962 (Count I), and for selling heroin on or about August 8, 1962 (Count II). Petitioner was arraigned on these charges in the California Superior Court on August 28, 1964. Petitioner claims that this long delay has denied him the right to a speedy trial, which he claims is guaranteed him by the United States Constitution.

It is our position that the United States Constitution protects a defendant from a denial of a speedy trial only insofar as the delay precludes a fair determination of the charges pending against the defendant. See United States v. Fay (2d Cir. 1963), 33 Fed. 2d 620, cert. denied 365 US 817, 5 Fed. 2d 695, 81 S.Ct. 699; Polon v. Grieco (D.N.J. 1964), 226 F. Supp. 414. As is indicated by these cases in order for a defendant to rely upon the United States Constitution, he must claim and prove prejudice resulting from the delay in his trial. In the instant case, no prejudice is claimed, let alone proved, and consequently it is not necessary to consider the applicability to the United States Constitution since the instant case presents no federal question.

We also submit that the evidence in this case establishes good cause for the delay in the trial of petitioner's case.

#### GOOD CAUSE

While petitioner was represented by counsel on his motion to dismiss for alleged lack of a speedy trial, the following evidence was adduced at hearings on the motion (references are to Reporter's transcript of proceedings in Los Angeles Superior Court):



William H. Slagle, a police officer for the City of Los Angeles, checked the jail records of the Los Angeles County and City jails on November 14, 1964, (the day before the indictment) to ascertain whether the petitioner was incarcerated in jail. On November 17th, Officer Slagle telephoned several of the little towns bordering the city limits of Los Angeles to ascertain whether Beasley might be a prisoner in one of these outlying areas. Slagle was unable to locate Beasley by these means. (Rep. Tr. pp. 64-68.)

On November 15, 16 and 17, 1962, over 75 officers of the Los Angeles Police Department were assigned the specific task of locating suspects wanted for narcotic violations who had been indicted by the Grand Jury. One of these suspects was the petitioner, [affidavit of Burt Cain, an officer assigned to the Los Angeles Police Department; although portions of Officer Cain's affidavit were ordered stricken by the trial court, other portions were admitted into evidence (Rep. Tr. p. 78] and only those portions of Officer Cain's affidavit which were admitted into evidence are relied on herein).

One of these 75 officers was Officer Slagle who went to the area of Adams and Normandie looking for petitioner. (Rep. Tr. p. 66.) During the three days of the round-up, Officer Slagle checked that area several times and thereafter checked it off and on. (Rep. Tr. p. 67.) During the course of the round-up, Officer Slagle looked for Beasley ten, fifteen or twenty times. (Rep. Tr. p. 68.)

Another officer who participated in searching for persons indicted by the Grand Jury during this round-up was Lee W. Moody. (Rep. Tr. pp. 70-71.) Officer Moody had seen petitioner on numerous





casions around the Adams and Normandie area and was aware that petitioner had lived in the Cozy Island Motel, which is on the north-st corner, east of the service station at Normandie and Adams. (Rep. Tr. p. 71.) After learning that petitioner had been indicted by the Grand Jury, Officer Moody went to the corner of Normandie and Adams numerous times and checked the hot dog stand there. (Rep. Tr. p. 71.) He also went to the manager of the Cozy Island Motel during the round-up and checked with him. (Rep. Tr. pp. 71-72.) At the Cozy Island Motel, Officer Moody made inquiries as to a new address for petitioner, but was unable to obtain a new address. (Rep. Tr. p. 73.) He checked with numerous people on the street that he knew from frequenting that area. (Rep. Tr. pp. 71-72.) No one knew of petitioner's whereabouts. (Rep. Tr. p. 72.)

Officer Moody went to an address on 33rd Street and checked for petitioner there but discovered that petitioner was not there. (Rep. Tr. p. 73.) At that address he talked to some woman who lived there and stated that petitioner had gone and that she did not know where petitioner went. (Rep. Tr. p. 73.) Officer Moody believes he checked with this woman on a Sunday night and she told him that petitioner had left on a Thursday night or early Friday morning, but that she did not know where he had gone. (Rep. Tr. pp. 73-74.)

Percy H. Thompson is the police officer who testified before the Grand Jury in regard to the case now pending against petitioner. (Rep. Tr. p. 75.) After learning that petitioner had been indicted, Officer Thompson went to the address which he knew as petitioner's residence and talked with a female there who stated that petitioner had left hurriedly for an undisclosed location. The address that



icer Thompson checked was 339 East 33rd Street. Officer Thompson e this check on either November 20th or 21st, 1962. On two other asions Officer Thompson looked for petitioner in the vicinity of mandie and Adams but was unable to locate petitioner. This was er November of 1962. (Rep. Tr. pp. 76-78.)

On November 17, 1962, an all-points bulletin was dispatched the Los Angeles Police Department teletype listing the name of itioner and his description as an outstanding narcotic sale sus- t. This teletype is received by virtually all law enforcement ncies in the State of California, and should petitioner be placed er arrest by any law enforcement agency within this state, a munication of this fact would be sent to the Los Angeles Police artment. (Affidavit of Burt Cain.)

The evidence indicates that the first time an officer from Los Angeles Police Department became aware of the whereabouts of itioner after his indictment was on or about August 15, 1964, when eleteype was received from San Francisco indicating that petitioner in their custody. (Affidavit of Burt Cain.)

Petitioner was arrested in San Francisco on or about ruary 19, 1964, at which time petitioner had no identification on at all and used the name of Raymond Sweetwyne. (Rep. Tr. p. 28.) itioner was booked under this name and gave no middle initial. p. Tr. pp. 28-29.) The arresting officer never knew petitioner er any other name than Sweetwyne until he received a subpoena to tify in November, 1964. (Rep. Tr. p. 31.) At the time petitioner, as Sweetwyne, was arrested, the arresting officer checked him out ough the Central Warrant Bureau in San Francisco under the name Raymond Sweetwyne. (Rep. Tr. p. 32.)





Petitioner testified that all of his friends knew him by name Raymond Beasley. (Rep. Tr. p. 46.) Petitioner worked and paid under the name Raymond Beasley. (Rep. Tr. pp. 47, 57.)

Petitioner's professional name in athletics was Raymond R. Asley. (Rep. Tr. p. 51.) There is no question in petitioner's mind that his name is Raymond Beasley and that is the name on his identification from the Merchant Marines. (Rep. Tr. pp. 57-58.) However, when he was arrested he used the name Sweetwyne even though he did not use that name often. (Rep. Tr. p. 47.) Sweetwyne is a family name. (Rep. Tr. p. 47.) Petitioner, according to his testimony, used the name Raymond Sweetwyne when he was arrested because he was "provoked by the officer." (Rep. Tr. p. 58.) At the time the petitioner was brought down to the station and booked and his fingerprints were taken and he signed the name Raymond Sweetwyne, he did so because he was "still provoked with the officer." (Rep. Tr. p. 58.)

Just prior to leaving Los Angeles, petitioner lived at an address which he does not know, but the address 339 East 33rd Street rings a bell with petitioner. (Rep. Tr. p. 53.)

#### THE FACTS PRESENTED ESTABLISH GOOD CAUSE

We submit the facts as above outlined presented to the California Superior Court establish good cause for the delay in bringing petitioner to trial. We submit that the police did all that was reasonably possible in an effort to locate the petitioner, namely, they went to those places which petitioner was known to frequent in Los Angeles and they then put out an all-points bulletin





all other law enforcement agencies in the state regarding the  
want outstanding petitioner when they were unable to find  
petitioner in Los Angeles and vicinity. It is true that petitioner  
and himself in the clutches of the law in February, 1964, and  
apparently the San Francisco law enforcement agency did not dis-  
cover the fact that the person whom they had arrested was the same  
person who was wanted by the Los Angeles Police Department. Of  
course, petitioner attempts to explain away the fact that he was  
doubtedly responsible in great part for this oversight due to  
his use of a "family name," which name was one that he did not  
usually use nor was it a name that was used among his acquaintances,  
or on the various jobs he held. Petitioner's sole explanation for  
the use of this name is that he was "provoked" into using it. We  
submit that the court below had every right to reasonably conclude  
that such an explanation was false, and that petitioner became a  
fugitive from justice when he left Los Angeles, and desired to cover  
his true identity in order to evade any possible trouble he had  
run into in Los Angeles. We submit that it is quite reasonable  
to conclude that petitioner somehow became aware of the narcotic  
wind-up that took place, and fled Los Angeles since he had sold  
narcotics to an undercover police officer, and that he kept his true  
identity from the San Francisco police to avoid criminal responsibility  
for crimes he committed while in Los Angeles.



## CONCLUSION

We submit that even if petitioner was justifiably "provoked" to using a family name, as he claims, the law should not be "provoked" into granting him immunity for the criminal conduct alleged against him. He only faces a fair trial in a fair forum. His appeal should be denied.

Respectfully submitted,

EVELLE J. YOUNGER  
District Attorney of Los Angeles  
County, State of California

By

HARRY WOOD  
Chief, Appellate Division

ROBERT J. LORD  
Deputy District Attorney

## CERTIFICATE

I certify that in accordance with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in substantial compliance with those rules.

EVELLE J. YOUNGER  
District Attorney of Los Angeles  
County, State of California

By

ROBERT J. LORD  
Attorney for Appellees





No. 20236

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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UNITED STATES RUBBER COMPANY,

*Appellant,*

v.

FRANCIS WRIGHT and MATT S. HUGHES,  
Trustee in Bankruptcy for Hank Wright's Sons, Inc.,  
a corporation, and MATT S. HUGHES,  
Trustee in Bankruptcy for Francis Wright,

*Appellees.*

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**APPELLEES' ANSWERING BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon*

HON. WILLIAM G. EAST, Judge

---

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**United States**  
**COURT OF APPEALS**  
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UNITED STATES RUBBER COMPANY,

*Appellant,*

v.

FRANCIS WRIGHT and MATT S. HUGHES,  
Trustee in Bankruptcy for Hank Wright's Sons, Inc.,  
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*Appellees.*

---

**APPELLEES' ANSWERING BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon*

HON. WILLIAM G. EAST, Judge

---

**STATEMENT OF JURISDICTION**

On September 10, 1962, plaintiffs, Francis Wright, a citizen of Oregon, and Hank Wright's Sons, Inc., an Oregon corporation, filed a civil action against the appellant United States Rubber Company, a New Jersey Corporation, with its principal place of business in the

State of New York. The amount in controversy exceeds \$10,000 (R. 9, 10). Jurisdiction of the district court was based on 28 U.S.C. 1332.

After pre-trial proceedings in which appellant refused to admit any facts except those material to its counter-claims, the incorporation or citizenship of the parties, and the appointment of Matt S. Hughes as Trustee (R. 10, 11), a Pre-Trial Order was signed by the parties and approved by the court (R. 9-29, inclusive). Thereafter appellant filed a motion labelled "Motion for Summary Judgment" in which it urged that the plaintiffs' contentions do not state a claim upon which relief can be granted. This motion was finally denied by Order dated July 7, 1965 (R. 40-41).

It is from this Order that appellant prosecutes its appeal under Title 28 U.S.C., Section 1292 (b). The lower court found that the order involved a controlling question of law as to which there exists a substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation (R. 41). This Court granted leave to file the immediate appeal.

### STATEMENT OF THE CASE

Appellant's statement of the case is accurate though somewhat confusing. This case was brought by the original plaintiffs to recover damages for breach of an agreement to finance appellee, Francis (Hank) Wright, as a dealer for U. S. Rubber (R. 13-18, Contentions 2-16, inclusive).

The actual dealership was to be in the name of the corporation formed by Wright, Hank Wright Sons, Inc., and such corporation was the other plaintiff in the initial complaint.

The plaintiff corporation filed voluntary bankruptcy proceedings in June, 1963 (R. 10) and the plaintiff Francis Wright, individually, filed a petition to be declared a bankrupt in October, 1964 (R. 10, Contention 10). In each proceeding the Trustee was authorized to continue the pending litigation and was joined or substituted herein as plaintiff.

The plaintiff, Francis Wright, individually, is seeking damages for injury to his credit (R. 19, Contention 25). The plaintiff Hughes, as Trustee for Hank Wright's Sons, Inc., the corporation, is seeking damages in the amount of \$94,000 representing its expenses incurred in fulfilling its contractual obligations (R. 19, Contention 20, 23). The Trustee for Francis Wright is seeking damages for \$79,500 less \$51,000 representing a personal guarantee of the corporation debts by the plaintiff Francis Wright (R. 18, Contention 19; R. 19, Contention 24), or a net claim of \$28,500 broken down in Contention 19, R. 18, as \$25,000 for sums spent by the plaintiff in performing his contract with defendant and \$3,500 for the reasonable value of his labor in performing his part of the agreements with appellant.

No claim is made by any plaintiff for loss of profits.

Appellant made thirteen (13) contentions, the last three (3) of which are urged here, namely, that the appellees' contentions do not state a claim upon which relief can be granted.

## SUMMARY OF ARGUMENT

Appellant has assigned four specifications of error which we will answer in sequence.

1. SPECIFICATION OF ERROR 1. Appellees' contentions (R. 12-19) state claims in favor of Francis Wright upon which relief can be granted:

(a) A breach of contract was alleged (Contention 17, R. 18).

(b) There can be a recovery for damage to credit and impairment of standing in the community. Such damages are reasonably foreseeable and within the contemplation of the parties.

*Coffey v. Northwestern Hospital Assn.*, 96 Or. 100, 183 Pac. 762, 189 Pac. 407 (1919).

*Hinish v. Meier & Frank Co.*, 166 Or. 482, 112 P.2d 438 (1941).

*Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 Pac. 1113 (1922).

*Quillen v. Schimpf*, 133 Or. 581, 291 Pac. 1009 (1930).

*Westesen v. Olathe State Bank*, 78 Colo. 217, 240 Pac. 689, 44 A.L.R. 1484 (1925).

Restatement *Contracts*, §§ 343, 330.

Sutherland on *Damages*, Vol. III, § 980, 4th Ed. (1916).

Cf. *Dalton v. Waggoner*, 30 S.W.2d 665 (Texas, 1930).

(c) Title to such claim remains in the individual plaintiff since it affects his future earning capacity, and his future standing in the community.



*Boudreau v. Chesley*, 135 F.2d 623 (1st Cir., 1943).

See also, Annot., 66 A.L.R.2d 1217, at 1219 (1959).

(d) The contract was not so indefinite and uncertain as to be unenforceable as a matter of law.

*Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 Pac. 1113 (1922).

2. SPECIFICATION OF ERROR 2. The Trustee's claim for Francis Wright states a claim upon which relief can be granted, in the following particulars:

(a) It *does* allege a breach (same point as in answer to specification 1 (a) *supra*) (See R. 18, Contention 17).

(b) The promise was not so indefinite and uncertain as a *matter of law* that the claim should be dismissed (same argument as under specification 1 (d) *supra*).

*Goodman et al v. Dicker et al*, 169 F.2d 684 (D.C.C.A., 1948).

*American Can v. Garnett*, 279 Fed. 722 (9th Cir., 1922).

3. SPECIFICATION OF ERROR 3. The claim for the Trustee, on behalf of Hank Wright's Sons, Inc., the corporation, is not unenforceable as a matter of law because of indefiniteness and uncertainty:

(a) The contentions set forth the essential elements of the contract and the degree of definiteness is a matter of evidence. This Court does not have before it any of the exhibits identified at the time of the pre-trial and reserved by the Pre-Trial Order (R. 23).

(b) Assuming, however, that this is not a question of evidence, contracts such as the one alleged in appellee's contentions (R. 14, Contentions 9, 11, 12, 14, 15) are enforceable.

*Allied Equipment Co. v. Weber Engineered Prod. Inc.*, 237 F.2d 879 (4th Cir., 1956).

*Commercial Security Bank v. Hodson*, 15 Utah 2d 388, 393 P.2d 482 (1964).

*Howland v. Iron Fireman Mfg. Co.*, 188 Or. 230, 213 P.2d 177, 215 P.2d 380 (1950).

*Hunt Foods v. Phillips*, 248 F.2d 23, at 30 (9th Cir., 1957).

*Marrinan Medical Supply v. Fort Dodge Serum Co.*, 47 F.2d 458 (8th Cir., 1931).

*J. C. Millett Co. v. Park & Tiltford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. S.D., 1954).

*Corbin on Contracts*, Vol. 1A, Sec. 155, p. 26 et seq (1963).

See also, Annot., 17 A.L.R.2d 1300 (1951).

4. SPECIFICATION OF ERROR 4. The contract of December 26, 1961, was neither void nor superseded:

(a) The contract between Hank Wright's Sons, Inc. and appellant was not void for lack of mutuality. It was a bilateral contract. It is for the trier of fact to determine whether or not Hank Wright's Sons, Inc. was obligated to maintain an inventory, warehouse, retreading facilities, a sales organization to meet the demands of the market, etc. Generally a distributorship contract is more than a mere agency agreement.

*Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Ltd. U.S.A., Inc.*, 129 N.W.2d 731 (Iowa, 1964).

- C. C. Hauff Hardware v. Long Mfg. Co.*, 136 N.W.2d 276 (Iowa, 1965).  
*Hunt Foods Inc. v. Phillips*, 248 F.2d 23 (9th Cir., 1957).  
*Jack's Cookie Company v. Brooks*, 227 F.2d 935 (4th Cir., 1955).  
*J. C. Millett v. Park Tiltford Distillers Corp.*, 123 F. Supp. 484 (N.D., Cal. S.D., 1954).  
 Corbin on *Contracts*, Vol. 1 A, Sec. 152, p. 4 (1963).

(b) The December 26, 1961, agreement was not superseded by Exhibit A, the consignment agreement dated December 27, 1961 (R. 24-28). The December 26, 1961, agreement (Appellees' Contentions 14, 15; R. 15-18) was an agreement between the parties, partly oral, partly written, partly evidenced by forecasts, and confirmed by correspondence.

The "consignment agreement" had nothing to do with the financing, assisting in advertising, making payroll payments, etc., and by its terms (R. 28, Clause 25) only superseded agreements on the subject of the furnishing, selling or consignment of tire merchandise. Exhibit "A" (R. 24-28), a printed form prepared by appellant, in paragraphs 12 and 20, does not purport to list the exclusive agreement but each paragraph states that the parties "shall *among other things*:" (Emphasis added). Appellees contend it is immaterial whether Exhibit "A" was signed before or after the main agreement was reached. Exhibit "A" governs the details of the consignment of merchandise; the contract summarized in appellees' contentions delineated the responsibilities of the parties as manufacturer and distributor or dealer.

## ARGUMENT

### 1. Specification of Error No. 1

(a) Appellant first argues that there is no allegation of a breach of the contract between appellant and Hank Wright personally. In the Pre-Trial Order, appellant made no such specific contention (R. 20-22) although, of course, it can be argued under Defendant's Contention 11 (R. 22), that the plaintiffs' contentions failed to state a claim against defendant upon which relief can be granted to Francis Wright. We mention this because, had the writer any idea that appellant would seriously be arguing this question before the Court of Appeals, the language would have been more artfully phrased. It is respectfully submitted, however, that appellant is not misled and the contentions do allege such a breach. We respectfully submit that the following language, taken from Plaintiffs' Contention 7 (R. 14) and Plaintiffs' Contention 17 (R. 18), is a fair and succinct summation of plaintiffs' contentions and that there is nothing obscure or hidden about plaintiffs' position:

"7. . . . defendant entered into an agreement with Francis Wright that it would, . . . enter into a subsequent contract with a corporation to be formed by Francis Wright by the terms of which contract it would extend credit, marketing advantages, and loans sufficient to finance the proposed business. . . ."

"17. . . . about January 23, 1962, in breach of the contract of December 26, 1961, with Hank Wright's Sons, Inc., the defendant stopped Hank



Wright's Sons, Inc. line of credit, refused to furnish the first \$10,000 cash due under said contract, ceased the other benefits . . . and demanded an additional personal guarantor . . . That Francis Wright and Hank Wright's Sons, Inc., . . . offered to furnish the additional \$5,000 guarantor but defendant still refused to continue to operate under the terms of its contract *with the plaintiff Francis Wright* and the plaintiff Hank Wright's Sons, Inc. and the defendant has refused to comply with said contract since said time except for a brief period in February, 1962, during which time limited credit was extended to Hank Wright's Sons, Inc." (Emphasis added)

The plaintiff appellee, Francis Wright, was not interested in merely a contract to extend certain advantages to the corporation he and his sons were to form. He was interested in the advantages and the performance of the contract. Since the corporation had not yet been formed, the proposal was made to Mr. Wright personally. The purpose of stating plaintiffs' contentions is not to outline or delineate all of plaintiff's evidence, but on the contrary to advise the defendant and the Court of the nature of plaintiffs' claim that was based on breach of contract and the nature of the breach. It is respectfully submitted that the contentions meet this test.

It is obvious from their allegations (Contention 17, R. 18) that plaintiffs viewed both agreements as one transaction, i.e., "defendant still refused to continue to operate under the terms of its said *contract* with the plaintiff Francis Wright and the plaintiff Hank Wright's Sons, Inc. We assume that if the word "contract" were



plural, appellant would not object. Likewise, if, in plaintiffs' Contention 7 (R. 14), we had stated "that defendant entered into an agreement with Francis Wright that it would . . . enter into a subsequent contract with a corporation to be formed by Francis Wright" *and pursuant to such contract it would "extend credit, marketing advantages,"* etc. (italicized material added), we assume appellant would be satisfied.

We respectfully submit that the allegation of Contention 7 that A agreed with B that it would contract with C to extend C credit, is the same as A promising B that it would extend credit to C. Appellant's argument may or may not be effective to a jury but it should be reserved until such time.

b. Can Francis Wright recover damages for injury to his credit and impairment of his standing in the community?

The Pre-Trial Order alleges (Plaintiffs' Contention 18, R. 18) that appellant's breach of its contract to furnish credit, etc., caused the corporation, Hank Wright's Sons, Inc., to fail. The Pre-Trial Order further contends (Plaintiffs' Contention 11, R. 15) that Francis Wright personally, *with full knowledge of defendant* (Emphasis added) obligated himself by guaranteeing contracts for the purchase of equipment, delivering his personal note, etc.

In Contention No. 12, it is alleged that the corporation, Hank Wright's Sons, Inc., had no credit standing, that appellant knew of such fact, that the corporation obtained credit only because of the credit of Francis

Wright and the promise of appellant to give financial assistance to the corporation. Therefore, when the appellant breached its contract to assist the corporation in its finances, it was reasonably foreseeable that this would not only have a deleterious effect on the corporation, which had no credit, but would also have an equally serious effect on the personal credit standing of Francis Wright (See the case of *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 Pac. 1113 (1922), holding that loss of a plant and equipment and certain supplies was the reasonably expected result of a breach of a contract to extend credit to a fish cannery). In view of the allegations that the defendant had reason to know the facts and did know the facts at the time it breached the agreement, it is respectfully submitted that appellant had reason to foresee these damages.

In *Westensen v. Olathe State Bank*, 78 Colo. 217, 240 Pac. 689, 44 A.L.R. 14, 84 (1925), the Court allowed damages not only for "out-of-pocket" expenses but for humiliation and mental suffering resulting from the breach. Damages were awarded even though there was no showing that the breach was wilful, since the bank knew that it had agreed to loan the plaintiff money to finance his trip to California.

In *Hinish v. Meier & Frank*, 166 Or 482, 113 P.2d 438 (1941), the Oregon Supreme Court allowed a recovery for mental anguish for a violation of the right of privacy and states (166 Or. at 506):

" . . . it is well settled that where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the

direct, proximate and natural result of a wrongful act (citing cases). Violation of the right of privacy is a wrong of that character.

“The damages may be difficult of ascertainment, but not more so than in actions for malicious prosecution, breach of promise of marriage, or alienation of affections, and in many cases of libel, slander and assault. The law has never denied recovery to one entitled to damages simply because of uncertainty as to the extent of his injury and the amount which would properly compensate him.”

In *Dalton v. Waggoner*, a Texas case (30 S.W.2d 665), the Court allowed out-of-pocket damages but did not allow damages for the loss of reputation or humiliation or standing to the plaintiff, an experienced banker. The Court found that no special circumstances existed, that the appellee had no knowledge of the special circumstances under which damage did occur, and that the contract was not based upon the special circumstances alleged as the predicate for such damages.

In the Oregon case of *Coffey v. Northwestern Hospital Assn.*, 96 Or. 100, 183 Pac. 362, Rehearing denied 189 Pac. 407), the court allowed a recovery for mental anguish resulting from the breach of a contract to furnish plaintiff medical and surgical services.

In *Quillen v. Schimpf*, 133 Or. 581, 291 Pac. 1009 (1930), the Oregon court states the then general rule that mental pain and suffering alone does not constitute a basis for the recovery of substantial damages, but recognized even then the exceptions to the rule in actions “for breach of contract of marriage, in certain cases a

wilful wrong, especially those affecting the liberty for personal security, character or reputation, or domestic relations . . . as the ordinary, natural and proximate consequences of the wrong complained of" (a tort case). The Oregon case also cites with approval *Sager v. Sisters of Mercy*, 81 Colo. 498, 256 Pac. 8, 56 A.L.R. 655 (1927), in which the court allowed a recovery for "mental pain and suffering" from a wilful tort as the natural and proximate consequence of a wrong. The Oregon Court also approves *Westesen v. Olathe State Bank* (133 Or. at 596).

c. Appellant argues (Appellant's Br. 25) that, in any event, title to the claim for damages for loss of credit, etc. would pass to the Trustee in Bankruptcy. Appellant correctly assumes that appellees would cite *Boudreau v. Chesley*, 135 F.2d 623 (1st Cir., 1943), for the reason that this case was cited to the Court below in support of our position.

It is true that in *Boudreau* the cause of action was alleged, in part, as a "malicious conspiracy" and charged making false representations, etc. in furtherance of such conspiracy. The question was squarely before the Court as to whether the proceeds from this cause of action recovered by the plaintiff bankrupt belonged to the Trustee or to the plaintiff bankrupt, and the Court in determining that it belonged to the bankrupt stated (at page 624):

"The advantageous business relationship alleged to have been interfered with in the case at bar merely afforded . . . an opportunity to earn and acquire property in the future. The predominant injury



charged in the declaration is the ruining of (the plaintiff's) reputation, whereby his future earning capacity has been practically destroyed. But creditors are not entitled to share in the distribution of the capitalized value of the bankrupt's future earning capacity. As was said in citing case 'the earning power of an individual is the power to create property; but it is not translated into property within the meaning of the bankruptcy act until it has brought earnings into existence.' "

Also, see a discussion of this general problem at 66 A.L.R.2d 1217, et seq. Appellant does not contend that this cause of action could have been reached by attachment by a creditor. It is respectfully submitted that the answer does not depend on the affixing of the label *ex contractu* or *ex delicto* but rather on whether or not the damage was to plaintiffs' future earning capacity or was past damage to his estate. In the present case, we submit that this injury is clearly an individual one affecting Francis Wright's future earning capacity and standing in the community, and there is nothing in the case to warrant passing it to the Trustee in Bankruptcy.

We should further observe that even if appellant is correct, this would not extinguish or satisfy the claim but would only require amendment of the Pre-Trial Order to assert this contention by the Trustee. We believe it is a matter to be settled between the Trustee and the individual plaintiff and should not concern the appellant so long as appellant is not subjected to a double recovery.

d. Nor was the alleged contract too indefinite and



uncertain to be enforced. Plaintiffs' Contention 8 (R. 14) clearly sets forth the conditions of the unilateral offer that had to be satisfied by the plaintiff Francis Wright. He was to procure certain property, arrange for construction of a building, etc. It is apparent from appellant's argument that they do not contend there is any indefiniteness or uncertainty in this respect. They then argue that plaintiffs' Contention 7 (R. 14) is too indefinite because it refers only to extending credit, marketing advantages, and loans sufficient to finance the proposed business "all as hereinafter set forth".

Commencing in Contention 14 (R. 15) plaintiff sets forth, in some 15 particulars, the details of extending credit, marketing advantages (furnishing one giant tire, service truck, assistance in bidding on road construction jobs, etc.) and loans sufficient to finance the proposed business (\$40,000 operating capital, \$200,000 line of credit, and special discounts). We find it difficult to argue this point with appellant because it seems so clear that this contention does not purport to set forth all of the evidence to be adduced on this point. On the contrary, it does give appellant specific notice of the agreements and details of the financing which plaintiff contended appellant was to furnish. It is true that plaintiffs' contention does not state that the \$40,000 was to be furnished on (for example) the 30th day of operation, etc. On the other hand, we feel confident the evidence adduced from the forecasts made by appellant and produced from its records will supply complete specifics as to the details and manner in which this loan was to be advanced and, indeed, substantially all of the financing

to be accomplished. Again, we submit, this is a question for the trial court after having all of the evidence. In *Commercial Security Bank v. Hodson*, 15 Utah 2d 388, 393 P.2d 42 (1964) the Utah court held that the absence of all the details did not render an agreement illusory but presented a jury question.

## **2. Specification of Error No. 2**

The appellant next urges (Appellant's Br. 31) that the contentions of Matt S. Hughes, Trustee for Francis Wright, fail to state a claim because there is no allegation that the appellant breached the contract entered into between Francis Wright and U. S. Rubber, and, secondly, that the contract between Francis Wright and U. S. Rubber was void for indefiniteness. Both of these points have been considered, *supra*, under Specification of Error No. 1 and there is nothing to be gained by repetition.

## **3. Specification of Error No. 3**

Appellant contends that the claim of the Trustee on behalf of the corporation, Hank Wright's Sons, Inc., is unenforceable as a matter of law because: (a) it is indefinite and uncertain.

Before arguing, let the writer declare that it is his understanding that the purpose of stating plaintiffs' contentions in the Pre-Trial Order is to give a defendant notice of the nature of the contract upon which plaintiff relies, to advise him of plaintiff's theory of the case, and *not* to list all of the evidence expected to be adduced.

We are at a loss to understand how appellant expects this Court to rule the contract void for indefiniteness merely on the statement of the plaintiffs' contentions. For example, appellant objects (Appellant's Br. 34-35) that the contract was indefinite because of commencement and duration. No evidence has as yet been adduced as to the custom of the industry or as to what constitutes a reasonable time. Nor has the appellant's correspondence or plaintiff's deposition been received. These exhibits would spell out the specific territorial limits and outline the franchise rights, just as the appellant's forecasts will show exactly what was in the minds of each of the parties as to the nature and extent of the financing. The words "a giant tire service truck" have a definite meaning but this case is before this Court on a Pre-Trial Order prior to the hearing of any evidence, and it is respectfully submitted that the argument of appellant on this issue is beside the point.

Assuming, however, without conceding that the motion for summary judgment would properly raise the issue of indefiniteness and uncertainty, the Court has held that similar contracts were not void for this reason.

The appellant has cited four older cases on this point: *Jordan v. Buick Motor Co.*, 75 F.2d 447 (7th Cir., 1935), and *Tamm v. Ford Motor Co.*, 80 F.2d 723 (8th Cir., 1935) both rely upon *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001 (4th Cir., 1933), for the proposition that contracts such as these are indefinite and uncertain as to terms and as a result are lacking in mutuality, and therefore void. However, the Fourth Circuit

in *Allied Equipment Co. v. Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir., 1956), said:

"It is perfectly true that generally speaking a distributorship arrangement such as this does not constitute the basis for suits on account of quantities, prices, terms, and such items; and, generally speaking, they are terminable by either of the parties. In the Kirkmyer case, for example, this court held that an oral promise of a dealership, in so far as it related to the sale of the manufacturer's products to the dealer, was lacking in mutuality and was too indefinite to form the basis for a binding obligation on the part of the manufacturer. In that case the dealer had a franchise and was located in West Richmond. The manufacturer wanted a dealer in South Richmond and told the dealer it must move or lose the franchise. The manufacturer also promised that if an additional dealership were placed in West Richmond this dealer would get it. The dealer moved, and later another concern was awarded a dealership in West Richmond. The franchise which the dealer had, and in respect to which he incurred the expense of moving, etc., was not cancelled. The basis of his suit was the failure to award him the other franchise, in respect to which he had made no expenditures. But that is not the problem in our case. Here we are faced with the claim of a distributor who is being deprived of the very franchise which he has built up, allegedly at great expense.

"[2, 3] There is an exception to the general rule of which the Kirkmyer case is an expression. It is well settled that, where an employed agent, in reliance upon the agency and with the knowledge of his principal, expends funds in the interest of the



agency and of the principal, the principal is committed to the agency for a reasonable period of time, so that the agent may thus recoup his expenditures."

Also, appellant cites *Chappell v. FAD Andrea, Inc.*, 41 Ga 413, 153 SE 218 (1930), as authority for its position. However, in the conclusion of that case, the court (p. 220) indicates it cannot determine *damages* because of uncertain terms. Perhaps, if the plaintiff in that case had sought recovery for cost of performance, the result would have been different.

Finally, appellant relies on *Curtiss Candy Co. v. Silberman*, 45 F.2d 451 (6th Cir., 1930). The *Curtiss* case was rejected by the Ninth Court of Appeals as authority that franchise cases such as these lack mutuality in *Hunt Foods v. Phillips*, 248 F.2d 23 (9th Cir., 1957), at page 30, because the court in the *Curtiss* case found only a series of separate and independent sales, each complete in itself.

On the general problem of certainty in these contracts, the Oregon court has expressed itself in *Howland v. Iron Fireman Mfr. Co.*, 188 Or 230, 213 P2d 177, 215 P.2d 380 (1950):

"14, 15. Influenced by the realities of modern business practice, the courts manifest a tendency to uphold dealership contracts similar to the one asserted here as against attack on the grounds of indefiniteness or lack of mutuality. *Moore v. Shell Oil Co.*, 139 Or 72, 6 P2d 216; *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc.*, 29 F2d 3; *Jay Dreher Corporation v. Delco Appliance Corpo-*



ration, *Supra*; *Schnerb v. Caterpillar Tractor Co.*, *supra*; *Falstaff Brewing Corp. v. Iowa Fruit & Produce Co.*, *supra*; *Ken-Rad Corp. v. R. C. Bohanan, Inc.*, 80 F.2d 251; *Beebe v. Columbia Axle Co.*, *supra*; *Sargent v. Drew-English, Inc.*, 12 Wn. 2d 320, 121 P.2d 373; *Nathan Elson & Co. v. H. Beselin & Son*, *supra*; *Kelly Springfield Tire Co. v. Bobo*, *supra*; *Abrams v. George E. Keith Co.*, 30 F.2d 90; *Erskins v. Chevrolet Motors Co.*, *supra*; *Western Beauty Supply Co. v. Duart Sales Co.*, 192 Okla. 6, 133 P.2d 202. The contract disclosed in the plaintiff's evidence is not in our opinion void for uncertainty or lack of mutuality." (p. 292)

Corbin on *Contracts*, Section 155, discusses this matter pointedly:

"Often a sales agency contract does not fix the amount of goods or the number of articles that the agent must take or sell. The exigencies of business often require that this must be left flexible, so that it may vary with general business conditions and with manufacturing needs and difficulties. Such a contract usually contains various subsidiary promises on both sides. Said subsidiary promises are sufficient consideration for any return promises, so that the contract should not be held void for lack of 'mutuality' promises by the agent to advertise and to promote sales with diligence and by the manufacturer to supply goods to any reasonable extent as ordered, or readily to be found by implication. These implied promises also are sufficient consideration and are not so indefinite or uncertain as to be unenforceable."

*Marrinan Medical Supply v. Fort Dodge Serum*

Company, 47 F.2d 458 (8th Cir., 1931). In this case the court considers extensively the problem of contracts that do not specifically set forth the particular amounts or particular efforts that are to be expended under the terms of the contract. It reviews the cases and finds mutuality in these situations and comments at page 462:

“Contracts are usually entered into by businessmen with the purpose that they shall be performed, and there is an implied agreement that each party shall exercise good faith in trying to carry them out. Courts will take these elements into consideration in construing a contract.”

Most of the cases reviewed by appellees under mutuality also discuss the certainty problem. For example, in *J. C. Millett v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. S.D., 1954), where time was not set, the court supplied an indefinite time; where notice of termination was not set, the court found a reasonable notice. As to quantity, the court said:

“[3] The agreement is not fatally uncertain as to quantity. Bearing in mind the object of the contract—to promote the sale of Park & Tilford products—it is difficult to find a measure of the amount to be bought and sold more definite than the quantity that Millett could sell to the market it promised to endeavor to promote. Such promises as to quantity have been uniformly upheld by the California Courts and generally elsewhere.” (p. 491)

It is appellees' position that the more recent and better reasoned decisions find these agreements sufficiently definite and certain; and, that this result is consonant with the needs of modern business.

We point out that, at page 34, Appellant's Brief, appellant quotes from Corbin on *Contracts*, Section 95, without citing a page number. In Corbin on *Contracts*, Section 95, beginning at page 395, and immediately following the language quoted on page 34 of Appellant's Brief appears the following:

"Generalizations like the foregoing no doubt render some service in the administration of the law; but they may result in serious injustice unless they are applied with common sense in the light of much experience. Vagueness, indefiniteness, and uncertainty are matters of degree, with no absolute standard for comparison. It must be remembered that all modes of human expression are defective and inadequate. Every student of language knows this to be true of words. Every good dictionary shows that most important words have been given several, or even many, meanings; and these meanings themselves must be expressed in other words that are equally difficult of definition. Other modes of expression have like uncertainties; actions may, as the old adage avers, speak louder than words, but it is often not true that they express intention with greater definiteness and certainty. In every case, the function of the Court is to determine, as far as is possible, the intention of the contracting parties and to give equal effect thereto.

In considering expressions of agreement, the Court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to

the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make. The Court must not be overly fearful of error; it must not be pedantic or meticulous in interpretation of expressions."

We also note that in the pocket part supplement to Secs. 95 and 96, the editors of Corbin cite with approval *J. C. Millett Co. v. Park & Tiltford Distillers Corp.*, *supra*.

At the risk of redundancy, we emphasize again that the appellees in this case are not seeking damages for loss of profits. If they were, we then would appreciate the difficulty (though not insurmountable) of integrating the contract and supplying all of the details which might affect the amount of profit to be realized by the appellees. What appellees are seeking in this case are "out-of-pocket" expenses, i.e. the amount expended in reliance on the appellant's promise, together with the damages to the individual appellee's credit and standing in the community.

#### **4. Specification of Error No. 4**

The contract of December 26, 1961, was neither (a) void for lack of mutuality nor (b) superseded by Exhibit "A" (R. 24-28).

(a) The agreement between appellant and Hank Wright's Sons, Inc., pleaded in Plaintiff's Contentions 13, 14 and 15 (R. 15-18) does not lack mutuality. The specific obligations of the parties are set forth and contracts similar to that pleaded have been upheld in *J. C. Millett Co. v. Park & Tiltford*, 123 F. Supp. 484 (N.D.



Cal. S.D., 1954); *Hunt Foods v. Phillips*, 248 F.2d 23 (9 C.A., 1957) (which approves *Jack's Cookie Company v. Brooks*, 227 F.2d 935 (4th Cir., 1955)); *Des Moines Blue Ribbon Distributing Co., Inc., v. Drewry's Ltd. U.S.A.*, 129 N.W.2d 731 (Iowa, 1964); *C. C. Hauff Hardware v. Long Mfg. Co.*, 136 N.W.2d 276 (Iowa, 1965).

We also note that *Corbin* (Corbin on Contracts, Vol. 1 A, Sec. 152) points out, at page 4, the confusion of thought resulting from confusing mutuality and consideration.

“ . . . There are now plenty of cases that clearly recognize the validity of a unilateral contract. Courts now often say clearly that it is consideration that is necessary, not mutuality of obligation.” (Corbin on Contracts, Vol. 1 A, Sec. 152, p. 4)

(b) Appellant then argues (Appellant's Br. 45) that there was no mutuality because there was no consideration. It argues that, if the financing contract of December 26, 1961 was executed *after* Exhibit “A”, there was no consideration since Hank Wright's Sons, Inc., was already obligated to appellant; and, on the other hand, if the financing agreement was executed *before* Exhibit “A”, it was superseded because of, one, repugnancy (not pointed out); and, two, the “superseding clause” numbered 25 (R. 28).

This ignores the possibility that they were entered into simultaneously as a part of the same transaction. We think the evidence will show there was a two-day meeting in Seattle between certain of appellant's employees referred to in Plaintiff's Contention 1, and the



appellee Francis (Hank) Wright and one of his sons. It was at this meeting that the financing agreement referred to in Plaintiff's Contentions 13, 14 and 15 (R. 16-18) was reached.

After there had been the meeting of the minds and the agreement on financing, the parties then executed Exhibit "A" relating to only U. S. brand tires (the top line of appellant) (R. 24). It covered only one portion of the total agreement between the parties but did provide the specific terms of this phase of their agreement. Counsel also assumes that since paragraph 19 and 20 of Exhibit "A" (R. 27) set forth "among other things" certain obligations of the parties, that they are therefore the exclusive obligations of the parties. If this were correct, why did the printed forms state "among other things"?

It is respectfully submitted that Exhibit "A" was exactly what it says—an agreement relating to consignment of U.S. Tires and did not purport to contain or include all of the contract provisions between the parties. We think, therefore, it is immaterial whether the agreement mechanically was signed before, at the same time as, or after the financing agreement was concluded.

Furthermore, by the terms of paragraph 25 (R. 28), the agreement only superseded other agreements previously made on the subject of the "furnishing, selling or consignment of tire merchandise". It did not supersede agreements relating to financing. It was a printed form prepared by the appellant and should be construed against the appellant. Obviously, the superseding clause

was intended to vitiate previous printed forms or oral consignment agreements relating to tires.

See also, *Pace v. Jackson*, 155 Texas 179, 284 S.W.2d 340 (1955), affirming 275 S.W.2d 849, relating to mutuality and consideration, and *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 Pac. 1113 (1922).

### CONCLUSION

It is respectfully submitted that the arguments of appellant are all matters which are prematurely raised on a motion for a summary judgment with the possible exception of the point "b" urged under the first specification of error, namely, the question of whether or not Francis Wright individually may maintain this action for damages to his future standing in the community. This case should be remanded so that the disputed issues may be settled by the trier of the facts and this controversy which began in 1962 reach its ultimate conclusion.

The respondent corporation should be held to the same morals of the market place as any other entrepreneur and if it breached an agreement to finance the appellees Francis Wright and the predecessors in interest of the Trustee, it should bear the loss rather than Francis Wright or the creditors who relied on his credit and standing in the community in furnishing supplies, materials and merchandise for the ill-fated venture.

Respectfully submitted,

WALTER H. EVANS, JR.,  
Attorney for Appellees

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER H. EVANS, JR.,  
Attorney for Appellee



No. 20236

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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UNITED STATES RUBBER COMPANY,

*Appellant,*

v.

FRANCIS WRIGHT and MATT S. HUGHES,  
Trustee in Bankruptcy for Hank Wright's Sons, Inc.,  
a corporation, and MATT S. HUGHES,  
Trustee in Bankruptcy for Francis Wright,

*Appellees.*

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**APPELLANT'S REPLY BRIEF**

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*Appeal from the United States District Court for the  
District of Oregon*

HON. WILLIAM G. EAST, Judge

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

**FILED**

JAN 14 1966

WILLIAM E. WILSON, Clerk





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Inc., and the District Court erred in not dismissing said claim for the following reason:

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- (a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant; or
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**United States**  
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UNITED STATES RUBBER COMPANY,  
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v.

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Trustee in Bankruptcy for Hank Wright's Sons, Inc.,  
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**APPELLANT'S REPLY BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon*

HON. WILLIAM G. EAST, Judge

---

**PRELIMINARY STATEMENT**

Appellant in discussing appellees' answering brief will do so under the same specifications of error set forth in its opening brief.

## ARGUMENT

### I

1. The contentions of appellees applicable to the claim of Francis Wright as an individual fail to state a claim upon which relief can be granted appellee Francis Wright and the District Court erred in not dismissing said claim for the following reasons:

(a) Francis Wright does not claim that appellant breached the contract which said appellee alleges was entered into between said appellee and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

Appellees seek to avoid appellant's challenge to the legal sufficiency of the *facts* pleaded (contended) by appellees in the pretrial order with respect to the individual claim of Francis Wright for damages to his credit and standing in the community by drawing attention to certain conclusionary language used in the contentions.\* This appellees may not do.

Appellant's motion with respect to this cause of action is a motion under Rule 12(b)(6). Such a motion is deemed to admit the well-pleaded facts of the complaint but is not deemed to admit conclusions of law or unwarranted deductions of fact, 2 *Moore's Federal Practice*, Second Ed., n. 4, Par. 12.08 and cases there cited, p. 2244.

Appellees try to get away from the inescapable con-

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\* Appellant could not make this challenge prior to the time it did because this cause of action did not appear in the prior pleadings.

clusion of the *facts* pleaded in contentions 7, 13, 14 and 15, that is, that for a certain consideration appellant agreed to enter into a certain contract with a corporation to be formed and that appellant did enter into such a contract with the corporation, thereby fully performing the first contract. Appellees try to do this by pointing to the words "contract with the plaintiff Francis Wright" and the words "said contract" in contention 17. The inescapable conclusion of contentions 7, 13, 14 and 15 is that by January 23, 1962, the time referred to in contention 17, there was no contract with Francis Wright. It died on or about December 26, 1961, when appellant entered into the contract with the corporation. Appellees' mere reference to the earlier contract cannot legally resurrect it. Such reference is an unwarranted deduction from the prior-pleaded facts or an erroneous conclusion of law.

At page 9 of appellees' brief they take a cavalier attitude to the contentions of fact in the pretrial order. They regard them as nothing more than a repetition of notice pleading. As the court knows, by rule, the pleadings pass out of the case once the pretrial order is signed, and the purpose of this order, *inter alia*, is to pin down the parties to the precise facts and theories they plan to prove. Appellees had the opportunity from the time the original plaintiffs were adjudicated bankrupts to carefully formulate their theory and marshal their facts. By comparing appellees' original pleadings to their contentions in the pretrial order the court will see that they have freely taken advantage of that opportunity. Appellees at this time should stand on the contentions they wrote into the pretrial order.

Moreover we do not agree with appellees' suggestion at pages 9 and 10 of their brief that simple changes of language would remedy the situation. Reciting the word "contract" in the plural form in contention 17 would not change the facts and necessary legal conclusions flowing from contentions 7, 13, 14 and 15 of the pretrial order. The first contract was dead. The next suggested change in language on page 10 would not change matters at all because "such contract" in the phrase "and pursuant to such contract it would extend credit" etc. would still refer to the "subsequent contract" to be entered into with the corporation and it would be only to the corporation that appellant would be liable for failure to carry out the terms thereof.

Finally, on page 10 of their brief appellees ask the court to accept their A, B and C illustration. While it may or may not, depending on the facts, legally be the same for A to agree with B that it will enter into a contract with C containing certain terms as it is for A to promise B that it will do certain things for C, this illustration totally ignores the additional fact appellees pleaded in the instant case, viz., A did enter into the contract with C, so that the illustration of appellees is not comparable on the facts actually alleged.

Appellees are trying to create rights in a party out of a factual situation they have carefully alleged when no such rights legally exist. The broken contract, if there was one, was with C, the corporation, and not with B, the individual. C should be able to sue, as it does in another part of this action, for breach of the contract between A and C, but B should not be able to do so.

Appellees should not be allowed to perform this bit of legerdemain, to give B the same rights as C, and in the process pervert the purpose of pretrial orders. We reiterate that the claim of appellee Francis Wright should be dismissed for the simple reason that it fails to allege a breach of contract.

**(b) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant and that appellant breached this contract the damages claimed for breach of this contract by appellee Francis Wright, namely, damage to his credit and impairment of his standing in the community, are not proper elements to be considered in assessing damages for breach of a commercial contract of the type alleged.**

The individual appellee, Francis Wright, is attempting to obtain damages for claimed injury to his credit and for the lowering of his standing in the community. It should be specifically noted that appellees have been unable to find a single case—and as a matter of fact neither has appellant—where such damages have been awarded *to an individual* where there has been a breach of a contract to render financial assistance *to a corporation*.

As mentioned in our opening brief, such damages are something like humiliation and mental anguish and generally are non-recoverable in a suit for breach of a commercial contract. All of the cases cited by appellees are either pure tort cases which allow recovery for humiliation and mental anguish as a result of an unlawful di-



rect touching of plaintiff's personality, or are contract cases not involving loss of credit or mental anguish at all, or are contract cases falling within the few exceptions to the general rule of non-recovery recognized by *Williston On Contracts*, Rev. Ed. Vol. V, Sec. 1340 and *The Restatement of Contracts*, Sec. 341. The exceptions go off on the theory that mental suffering may be recovered where the contract was of such character (that is, where more than pecuniary benefits were contracted for) that the promisor had reason to know when the contract was made that breach would cause mental suffering for reasons other than mere pecuniary loss. None of appellees' cases involves a fact situation like the one alleged in appellees' contentions. As a matter of law, appellees' contentions fall short of what is necessary as a condition of being allowed to prove the damages claimed by the individual appellee Francis Wright.

In the instant case we start from and must always keep in mind the cardinal pleaded fact that a corporation was to be financed. It was the vehicle by which the alleged arrangements were to be implemented. It is this feature, among others, that distinguishes and disposes of appellees' cases.

*Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438, cited on pages 11 and 12 of appellees' brief, *Quillen v. Schimpt*, 133 Or. 581, 291 P. 1009, cited at page 12 of appellees' brief, and *Sager v. Sisters of Mercy of Colorado*, 81 Colo. 498, 256 P. 8, cited at page 13 of appellees' brief, are all pure tort cases. We could cite many such tort cases where damages for humiliation and metal anguish have been allowed. However, in all of these cases

the injury was directly to the individual personality of the party.

Turning now to the cases cited by appellees which are based on breach of contract: In *Coffey v. Northwestern Hospital Association*, 96 Or. 100, 183 P. 762, 189 P. 407, the *ad damnum* claim included humiliation and mental anguish among other items of damage, principally great bodily pain and suffering, but there was no issue raised as to the particular items of damage. There was a general verdict and the appeal concerned itself with the question of whether plaintiff or defendant breached the contract. In any event, as the court stated, while the basis of the action was a contract, the breach thereof sounded in tort. Further, the case stands within the well-defined exception to the general rule allowing such recovery in certain peculiar instances discussed in appellant's opening brief.\* Finally, there certainly was no corporation involved on the plaintiff's side of the case.

*Merchants Bank of Canada v. Sims*, 122 Wn. 106, 209 P. 1113, cited on page 11 of appellees' brief, is clearly not in point in that in this case the guarantors of the debt of a corporation were merely allowed to assert as a defense to a suit on their guarantees the loss to the corporation resulting from the plaintiff's failure to loan the corporation the sum of money agreed upon. This case might be stretched to cover damages for a loss of

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\* A more analogous type of medical case would be *Adams v. Brosius*, 69 Or. 513, 139 Pac. 729 (1914) in which the plaintiff's husband who employed a doctor could not recover for his mental suffering for the doctor's breach of his contract to attend the husband's wife during childbirth.

an investor's pecuniary investment in a corporation, but it certainly did not involve and certainly may not be read as an authority for the proposition that damage to an individual investor's personal credit and personal standing in the community is recoverable for failure to make a loan to a corporation.

Appellees' closest case in our view is *Westensen v. Olathe State Bank*, 78 Colo. 217, 240 P 689, cited at page 11 of appellees' brief. The plaintiff was there allowed to recover for his personal humiliation for breach of a contract to honor his personal checks based on a personal loan he negotiated with the defendant bank immediately prior to a trip to California. The defendant knew plaintiff would be far from home and among strangers. It was his personality which was directly touched with the defendant's breach and defendant when it made the breach under the facts of the case must have known that he would be so touched if it did not perform. Such a right to recover under these peculiar circumstances is a well-recognized exception to the general rule where an inference of dishonesty or crime on the part of the maker of a dishonored check could readily be drawn. However, in our case the parties at the time of the alleged agreement to make the loan contemplated that the personality of a corporation was to be interposed and it indeed was the one to be financed. It was the one that would be affected by any breach. We will shortly see that appellees' own allegations, under the principle of *Hadley v. Baxendale*, provide no basis for any inference that appellant had reason to know at the time the contract to finance the corporation was made that indi-

vidual appellee's credit or standing in the community would be touched at all, if appellant failed to perform.

Appellees are in error on page 11 of their brief (toward the end of the first paragraph) when they assert that foreseeability of damages is judged as of the time of breach of contract. It is what the parties knew or should have known with respect to probable damages at the time the *contract was entered into* that is controlling. See *The Restatement of Contracts*, § 341 at pages 559-560 cited at pages 18-19 of our opening brief, the case of *Dalton v. Waggoner*, 30 S.W.2d 665, cited at page 12 of appellees' answering brief, and *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803, cited at pages 20-21 of our opening brief. Appellant submits that the elements of foreseeability prescribed by *Hadley v. Baxendale* are far exceeded by appellees' claim in this case.

Let us look at the appellees' contentions with respect to the circumstances at the time of contracting for the loan to the corporation. One looks in vain for any contention at all about knowledge giving rise to any risk to the individual appellee's general standing in the community. The only allegation concerning defendant's knowledge at that time with respect to the individual's credit is that appellant knew that appellee had an excellent but limited credit standing (Plaintiffs' Contention 2, R. 13). Although it does not speak as of the time of making the contract, Plaintiffs' Contention 12, R. 15, states that the corporation obtained credit only because of the credit of the individual, Francis Wright, and the promises of the defendant to loan money. This conten-



tion is relied upon by appellees in their brief, bottom of page 10 and top of page 11, as a sufficient basis to allow recovery from appellant for damages to the individual's credit and his general standing in the community. Even if somehow, at the time the contract was entered into, knowledge that appellee-plaintiff was in general going to use his excellent though limited credit standing to help finance the corporation could be imputed to appellant, we submit that such knowledge would still fall far short of what is required to be alleged to recover the special damages the individual appellee is trying to obtain in this case. *There are no allegations of any facts relating to the time of the making of the contract to finance the corporation, upon which a conclusion could be based that appellant should have anticipated that if it did not live up to the contract, the individual plaintiff would go so far beyond the limits of his own financial capacity that his individual credit standing and his general standing in the community would be adversely affected.* What appellees allege in Plaintiffs' Contention 11, R. 15, is totally beside the point because it all came after the last possible contracting date for the loan. If the court, as it should, looks at the circumstances as of the time the contract was made, and particularly if the court holds that the individual appellee Francis Wright can sue because of the earlier of the two contracts alleged, the only other thing the court will find is that the individual plaintiff had just recently had a personal backer, Plaintiffs' Contention 5, R. 13-14, and that the individual had been planning to enter the business since early 1961.



It may be argued that based on appellees' contentions as of the time of the making of the agreement to finance the corporation, appellant should have anticipated at that time that damages and financial loss to the corporation would result, that the individual Francis Wright might lose some out-of-pocket expenses and his time, and possibly that the individual might lose his financial investment in the corporation if appellant did not keep its promise. Appellees are pursuing all these remedies in other causes of action. But appellee Francis Wright wants more from the alleged breach of contract to finance the corporation. He wants this court to allow him to recover special damages for injury to his credit and for lowering of his standing in the community, which depend upon relationships with many other parties, when there is absolutely no basis in the allegations that he has made from which appellant should have understood at the time the alleged agreement to finance the corporation was made that the individual appellee would go so far beyond his own financial capacity that he would endanger these relations with other parties if appellant did not make loans to the corporation. Under the circumstances of this case and all of the authorities cited, we submit that it would be without authority, an error as a matter of law, and unfair for this court to allow a jury to consider damages of the nature claimed by appellee Francis Wright even if they did occur. The implications for all ordinary commercial transactions if such recovery is allowed to be considered in this case would be widespread and unsettling, to say the least.

**(c) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant, that appellant breached this contract, and that damages for loss of credit and impairment of standing in the community are proper elements to be considered in assessing damages, title thereto would pass to the trustee in bankruptcy for Francis Wright.**

In discussing this specification of error appellees assert that this court should treat the claim of appellee Francis Wright for damages suffered as a result of his alleged loss of credit and the lowering of his standing in the community as though they arose out of a tort committed against the person of Francis Wright—that this court should disregard the label and look to the substance and treat the damages as personal to Francis Wright and not as passing to his trustee in bankruptcy. The objection to this reasoning is that if Francis Wright suffered any damage it arose not because of any tortious action on the part of appellant but because appellant breached a commercial contract. It is absurd to say that the damages came into existence because of a breach of a contract and in the same breath say that after being so created they should be treated as though they arose out of tortious acts of appellant. In fact the argument of appellees only accentuates our previous contention that no such damages could have been in the contemplation of the parties at the time the first alleged contract was entered into in the event of a breach thereof.

As to the argument what difference does it make as

to whether the claim still remains vested in appellee Francis Wright or passed to his trustee in bankruptcy so long as appellant does not have to pay double, we make this answer: At some stage of the pleadings the parties have to take a position from which they cannot deviate. Here in the face of the knowledge of all the facts as to the dealings between the parties the appellee-trustee has taken the position that the claim for damages is vested in appellee Francis Wright—a definite disclaimer and waiver.

**(d) The claimed contract between appellee Francis Wright and the appellant was void because of indefiniteness and uncertainty.**

In discussing Specification of Error I (d) appellees refer the court to Plaintiffs' Contention 14, R. 15-17, the promises made to Hank Wright's Sons, Inc., as though these promises were made by appellant to appellee Francis Wright at the time the first alleged contract was entered into, which we submit is not the case. The alleged promises that appellant made to Francis Wright were simply an indefinite agreement to extend credit, etc., to a corporation to be formed by appellee Francis Wright, Plaintiffs' Contention 7, R. 14. This promise was clearly too indefinite and uncertain to constitute an enforceable contract.

## II

2. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in bankruptcy for Francis Wright, and the district court erred in not dismissing said claim for the following reasons:

(a) Appellee Matt S. Hughes, trustee in bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) The claimed contract between appellee Francis Wright and Appellant was void because of indefiniteness and uncertainty.

No further discussion of this specification of error is deemed necessary.

## III

3. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., and the district court erred in not dismissing said claim for the following reason:

(a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty.

At the inception of their argument relative to this specification of error appellees state that the purpose of Plaintiffs' Contentions is to give defendant notice of the

nature of the contract upon which plaintiff relies and not to list all of the evidence expected to be adduced. We take issue with this statement. The Contentions of Plaintiffs, which supersede the pleadings and the complaint, must assert a claim upon which relief can be granted. If a good cause of action is set forth it is up to the defendant to meet any factual situation that may occur within the framework of the pleadings. In our opening brief we showed that the contract between Hank Wright's Sons, Inc. and appellant entered into on or about December 26, 1961, was so indefinite and uncertain as not to constitute an enforceable contract and we do not believe that the argument of appellees has in any way weakened this position. The mere fact that the damages claimed do not include a claim for loss of profits is immaterial, the sole question being whether the contract was definite and certain enough to constitute an enforceable contract.



## IV

**4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., without prejudice to appellant's counterclaims should be granted for the reason that:**

**(a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant;**

**or**

**(b) Said contract was expressly superseded by the bilateral contract between Hank Wright's Sons, Inc., and appellant entered into December 27, 1961.**

Appellees in treating this specification of error state that the "contract of December 26, 1961 was neither (a) void for lack of mutuality nor (b) superseded by Exhibit A." Appellant does not propose to discuss the technical distinction, if there is one, between lack of mutuality of obligations and lack of consideration. What appellant is asserting by Specification of Error IV (a) is simply that if Exhibit A was executed prior to the alleged contract of December 26, 1961, no binding contract was entered into between Hank Wright's Sons, Inc. and appellant at the latter time because there was no consideration for the alleged promises of appellant as Hank Wright's Sons, Inc. agreed to do nothing that it was not already obligated to do by virtue of the promises contained in Exhibit A. Therefore the discussion of appellees under Specification of Error IV (a), pages 23-24 of appellees' answering brief relating to "mutuality," the cases cited,

and the reference to Corbin, are purely academic. If Exhibit A was executed subsequently, appellant's position is that the alleged contract of December 26, 1961 was superseded by the written consignment agreement.

To avoid appellant's arguments under this heading appellees advance the theory that the alleged financing arrangements and the written consignment agreement were part of some larger simultaneous agreement, although even now appellees say the consignment agreement was signed after the financing arrangements were made (page 25 of appellees' brief). Appellees argue that the consignment agreement was a limited agreement because it related only to U. S. brand tires (thereby implying Hank Wright's Sons, Inc. was to sell other brands made by appellant). However, appellees conveniently ignore, at this point, the provisions of paragraph 25 of the consignment agreement and the typewritten language on the bottom of page 1, R. 24 of the agreement, which, when read together, make it clear that Hank Wright's Sons, Inc. was to have only the U. S. brand of tires to sell.

By its terms the consignment agreement was an integrated document covering all tires Hank Wright's Sons, Inc. was to handle, which appellees have admitted signing after all alleged arrangements were made. It deals with matters in addition to those directly involved in a consignment; it sets out the full relationship of the parties. In fact, it directly contradicts a number of the key elements of the arrangements alleged by appellees. The exclusivity alleged in Contention 14 (c) (10), R. 17, is denied by paragraph 11 of the consignment agreement.

Extra discounts alleged in Contentions 14 (c) (3), (6), and (7), R. 17, are in conflict with paragraph 21 of the consignment agreement which limits discounts to those in prescribed schedules. A \$200,000 line of credit, alleged in Contention 14 (b), R. 16, is inconsistent with paragraph 4 of the consignment agreement which called for prompt payments. Credit matters are touched upon again in paragraphs 7 and 26 of the consignment agreement.

Against this, appellees have only argued that the word "financing" does not appear in paragraph 25 of the consignment agreement and that the words "among other things" appear in paragraphs 19 and 20 thereof. We contend that the word "financing" is not necessary since paragraph 25 supersedes all agreements relating to the "selling" and "furnishing" of tire merchandise as well as the "consigning" of such merchandise. The language used in paragraph 25 contemplates the complete arrangements between the parties. If there were any doubt on this point the other terms of the written agreement make it clear.

Appellees' reliance on the words "among other things" in paragraphs 19 and 20 of the consignment agreement is unfounded. Obviously, the reference is to the many other things the parties have promised each other throughout the consignment agreement. That is the only natural way to read the agreement as a whole.

Whether the court considers Exhibit A, R. 28-29, referred to in Defendant's Contention 2, R. 20, as part of the pleading, (which we consider the appropriate treat-

ment), or as a matter outside the pleading and to be treated and disposed of under Rule 12 (c), Rules of Civil Procedure, as though it were a motion for summary judgment, is immaterial. If Exhibit A be considered as outside the pleading, the execution thereof by the parties is admitted by appellees and no conflicting documents or explanatory affidavits were offered by appellees, so there is no issue of fact involved. We submit that the court should deny recovery to appellee-trustee in bankruptcy for Hank Wright's Sons, Inc. because appellees have admitted (appellees' answering brief page 25) executing a document, Exhibit A, subsequent to the contract on which appellee-trustee is relying (Plaintiffs' Contentions 13, 14 and 15), that by its terms specifically superseded all prior arrangements and which was in conflict with major portions of the alleged prior contract.

## CONCLUSION

In concluding their brief appellees at page 26 refer to matters covered by this appeal as being "prematurely raised on a motion for a summary judgment," with one possible exception, thus implying that this court should not consider the legal points we have raised in our specifications of error because genuine issues of material facts are present. Again we state that we are proceeding under Rule 12 (b) (6) as to all specifications of error, although Rule 12 (c) may be preferred as to the fourth specification of error, and if it is held as to this last specification of error that facts are before the

court outside the pleadings this is immaterial, as there is no dispute as to these facts.

Respectfully submitted,

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#### **CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR S. VOSBURG

Of Attorneys for Appellant



No. 20236

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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UNITED STATES RUBBER COMPANY,

*Appellant,*

v.

FRANCIS WRIGHT and MATT S. HUGHES,  
Trustee in Bankruptcy for Hank Wright's Sons, Inc.,  
a corporation, and MATT S. HUGHES,  
Trustee in Bankruptcy for Francis Wright,

*Appellees.*

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**APPELLANT'S OPENING BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon*

HON. WILLIAM G. EAST, Judge

---

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**FILED**

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  - (a) Appellee Matt S. Hughes, Trustee in bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between appellee Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract ..... 31
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3. The Contentions of appellees applicable to the claim of Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, Trus-

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tee in Bankruptcy for Hank Wright's Sons, Inc., and the District Court erred in not dismissing said claim for the following reason:

- (a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty ..... 32

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- 4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. without prejudice to appellant's counter-claims should be granted for the reason that:

- (a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant; or
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**United States**  
**COURT OF APPEALS**  
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UNITED STATES RUBBER COMPANY,

*Appellant,*

v.

FRANCIS WRIGHT and MATT S. HUGHES,  
Trustee in Bankruptcy for Hank Wright's Sons, Inc.,  
a corporation, and MATT S. HUGHES,  
Trustee in Bankruptcy for Francis Wright,

*Appellees.*

---

**APPELLANT'S OPENING BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon*

HON. WILLIAM G. EAST, Judge

---

**JURISDICTIONAL STATEMENT**

This is a civil action brought originally by Francis Wright, a citizen of the State of Oregon, and Hank Wright's Sons, Inc., an Oregon corporation, against United States Rubber Company, a New Jersey corporation with its principal place of business in the State of

New York, to recover damages in the amount of \$250,000. The jurisdiction of the District Court was based upon the provisions of Title 28, U.S.C.A. § 1332, the amount in controversy being in excess of \$10,000, exclusive of interest and costs, and the controversy being between citizens of different states (R. 1-4). Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, was added as an additional party plaintiff and Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., was substituted as party plaintiff for Hank Wright's Sons, Inc. (R. 10).

In the Pretrial Order (R. 9) lodged with the District Court on December 10, 1964, in "Plaintiffs' Contentions", three separate and distinct claims, not separately stated, against appellant are purported to be asserted: a claim by appellee Francis Wright for damages in amount of \$100,000 for breach of a contract entered into between appellee Francis Wright and appellant, a second claim by appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, in the amount of \$28,500 for damages for breach of the aforementioned contract entered into between appellee Francis Wright and appellant, and a third claim by Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., in the amount of \$94,000 for damages for breach of a second and distinct contract entered into between Hank Wright's Sons, Inc. and appellant (R. 13-19). Two counterclaims were asserted by appellant and are conceded (R. 10-11). The change in the parties plaintiff did not in any manner affect the jurisdiction of the District Court as each claim

constituted a controversy between citizens of different states.

This is an appeal from an order of the District Court dated July 7, 1965, wherein said District Court certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. On motion of appellant, acquiesced in by appellees, on July 26, 1965, this court granted leave to file an immediate appeal pursuant to Title 28 U.S.C.A. § 1292(b), which appeal has now been perfected.

### STATEMENT OF THE CASE

In the original complaint appellee Francis Wright and Hank Wright's Sons, Inc. demanded a joint judgment against appellant for \$250,000 (R. 1-4). Appellant filed an Answer in the nature of a general denial and also asserted two counterclaims (R. 5-7). On December 10, 1964, a Pretrial Order (R. 9-29) was lodged with the court and subsequently signed by the District Court. Under Rule 34 (c) of the District Court the pretrial order supersedes the pleadings which are deemed to pass out of the case at that point. Appellees in said Pretrial Order (Plaintiffs' Contentions, R. 12-19, which we will hereafter refer to simply as "contentions") set forth three separate and distinct claims for damages for breach of contract which are not separately stated.

Contention 1 (R. 12-13) may be completely disre-



garded, as the allegations contained therein are entirely evidentiary. Contentions 2 through 6 (R. 13-14) state matters of inducement and have little, if any, pertinency to the questions involved in this appeal.

As to the claim of appellee Francis Wright, this appellee alleges that in early October 1961 appellant made an offer to appellee Francis Wright that it would enter into a contract with a corporation to be formed by said appellee by the terms of which contract it would "extend credit, marketing advantages, and loans sufficient to finance the proposed business, all as hereinafter set forth" (Contention 7, R. 14), in consideration of appellee Francis Wright performing certain acts (Contention 8, R. 14). Appellee Francis Wright alleges that he substantially performed all the acts required to be done by him to constitute an acceptance of the offer of appellant "or tendered the performance of them to defendant" (Contention 9, R. 14-15). Nowhere in the contentions does appellee Francis Wright allege that appellant breached the unilateral contract above outlined and in fact affirmatively alleges that appellant fully performed this contract in that on or about December 26, 1961, appellant and Hank Wright's Sons, Inc. entered into a bilateral contract wherein appellant promised to loan Hank Wright's Sons, Inc., the corporation formed by appellee Francis Wright, a specified sum of money, authorized a line of credit and agreed to provide other financial assistance (Contentions 13 and 14, R. 15-17).

Appellee Francis Wright then claims that appellant breached its contract with Hank Wright's Sons, Inc.,



causing that corporation to fail (Contentions 17 and 18, R. 18) and that as a result of the breach of contract between Hank Wright's Sons, Inc. and appellant, appellee Francis Wright was damaged in the amount of \$100,000 in that his credit was damaged and impaired and his standing in the community was lowered (Contention 19, R. 18-19). It is further contended that this element of damage did not pass to said appellee's Trustee in Bankruptcy, Matt S. Hughes (Contention 22, R. 19).

Appellant in its contentions asserted that the allegations contained in "Plaintiffs' Contentions" failed to state a claim against appellant upon which relief can be granted appellee Francis Wright (Defendant's Contention 11, R. 22) and filed a motion wherein appellant clearly asserted that the claim of appellee Francis Wright failed to state a claim against appellant upon which relief could be granted appellee Francis Wright (R. 30-31). On the basis of the appellant's understanding or misunderstanding of the lower court's prior suggestion, the motion was, unfortunately, captioned as a motion for summary judgment under Rule 56, but the language of the body of the motion and all of the supporting papers made it clear that appellant was seeking to test the sufficiency of the alleged cause of action as a pleading or as a matter of law under Rule 12. Moreover the motion and supporting papers made the same objections severally as to the other causes of action alleged by the plaintiffs. Thereafter the District Court entered an order, dated April 2, 1965, denying the motion on the grounds that issues of fact existed. The court did

not rule on the questions actually raised by the appellant (R. 32-33) and did not treat the causes of action separately. Thereafter appellant filed a motion for reconsideration and in the alternative for allowance of an immediate appeal (R. 34-39), pointing out that the gist of the motion was under Rule 12, that the motion was made individually as to each of the causes of action alleged by the plaintiffs, and that the court had not ruled or had not ruled properly in its order of April 2, 1965. The District Court then made its order of July 7, 1965 (R. 40-41). That order stated that some of plaintiffs' contentions, without specifying which ones, stated a claim on which relief could be granted. An immediate appeal from that order was allowed by this court.

The precise question, therefore, before this court as to appellee Francis Wright is whether the allegations with reference to the individual claim of appellee Francis Wright state a claim upon which said appellee would be entitled to recover damages, which includes the question of whether a valid contract was actually entered into, whether a breach of contract has been alleged and, if so, whether the only damages demanded, namely damages for loss of credit and lowering of his standing in the community, are proper elements of damage, and if they are, who was entitled to recover these damages.

As to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, the alleged contract which is the basis for this claim is the identical unilateral contract upon which the claim of appellee Francis Wright is based and all facts heretofore set forth with reference to the claim of appellee Francis Wright are

applicable to this claim, except the difference in the claim for damages. As to damages, appellee Matt S. Hughes, trustee, claims that appellee Francis Wright was entitled to recover the sum of \$25,000 expended by appellee Francis Wright in performing his part of the unilateral contract, together with the sum of \$3,500, being the value of the time spent by appellee Francis Wright personally in doing the acts necessary to constitute an acceptance of appellant's offer, and that this claim vested in appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright by operation of law under the Bankruptcy Act.

The procedure followed by appellant in raising the contention that this claim failed to state a claim upon which relief can be granted was the same as in the case of the claim of appellee Francis Wright.

The precise question, therefore, before this court as to the claim of Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, is whether the allegations with reference to the individual claim of appellee Francis Wright which subsequently vested in appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, by operation of law, state a claim against appellant upon which relief can be granted appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright.

Now as to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., his derivative claim is based on a separate and distinct contract, a bilateral contract which was claimed to have been entered into on or about December 26, 1961 (Con-

tention 13, R. 15). The promises alleged to have been made by appellant are set forth in Contention 14 (R. 15-17) and the promises made by Hank Wright's Sons, Inc. to appellant are set forth in Contention 15 (R. 17-18). The purported performance of this contract by Hank Wright's Sons, Inc. and breach thereof by appellant are set forth in Contentions 16 and 17 (R. 18). The damages claimed to have been suffered by Hank Wright's Sons, Inc. for breach of this contract which vested in appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., pursuant to the Bankruptcy Act, amount to \$94,000, being the expenses claimed to have been incurred by Hank Wright's Sons, Inc. in fulfillment of its contractual obligations (R. 19).

The procedural steps whereby appellant asserted that these allegations failed to state a claim upon which relief could be granted are the same as outlined in discussing the claim of appellee Francis Wright. In addition appellant raised the point in its Contentions (Defendant's Contentions 8, R. 21) that the alleged agreement was void for lack of mutuality, reiterated in its Statement of Points to be Relied Upon by Appellant on the Appeal, being Specification of Error 4(a) and 4(b) *infra*.

### **SPECIFICATIONS OF ERROR**

1. The Contentions of appellees applicable to the claim of Francis Wright as an individual fail to state a claim upon which relief can be granted appellee Francis Wright and the District Court erred in not dismissing said claim for the following reasons:



(a) Appellee Francis Wright does not claim that appellant breached the contract which said appellee alleges was entered into between said appellee and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant and that appellant breached this contract the damages claimed for breach of this contract by appellee Francis Wright, namely, damage to his credit and impairment of his standing in the community, are not proper elements to be considered in assessing damages for breach of a commercial contract of the type alleged.

(c) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant, that appellant breached this contract, and that damages for loss of credit and impairment of standing in the community are proper elements to be considered in assessing damages, title thereto would pass to the Trustee in Bankruptcy for Francis Wright.

(d) The claimed contract between appellee Francis Wright and the appellant was void because of indefiniteness and uncertainty.

2. The Contentions of appellees applicable to the claim of Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright and the District Court erred in not dismissing said claim for the following reasons:



(a) Appellee Matt S. Hughes, Trustee in Bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between appellee Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) The claimed contract between appellee Francis Wright and appellant was void because of indefiniteness and uncertainty.

3. The Contentions of appellees applicable to the claim of Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., and the District Court erred in not dismissing said claim for the following reason:

(a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty.

4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. without prejudice to appellant's counterclaims should be granted for the reason that:

(a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant; or

(b) Said contract was expressly superseded by the bilateral contract between Hank Wright's Sons, Inc., and

appellant entered into December 27, 1961.

### SUMMARY OF ARGUMENT

As to appellee Francis Wright, it is the contention of appellant that the allegations applicable to the claim of appellee Francis Wright fail to state a claim upon which relief can be granted for any one of four reasons enumerated under Specification of Error 1 and that the District Court erred in not dismissing this claim. We will present detailed argument in support of this position under four subheadings.

As to appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, it is the contention of appellant that the allegations applicable to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted for either of two reasons enumerated under Specification of Error 2, and that the District Court erred in failing to dismiss this claim. We will present detailed argument in support of this position under two subheadings.

As to appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., it is the contention of appellant that the allegations applicable to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted for the reason that the alleged contract between Hank Wright's Sons, Inc. and appellant, the contract of December 26, 1961 as dis-

tinguished from the unilateral contract between appellee Francis Wright and appellant, was void because of indefiniteness and uncertainty and that the District Court erred in failing to dismiss the claim.

It is the further contention of appellant that considering all the pleadings in this case set forth in Plaintiffs' Contentions (Contentions 13, 14 and 15, R. 15-18) and Defendant's Contentions (Defendant's Contention 2, R. 20) and admissions of appellees (R. 23), the claim of Matt S. Hughes, Trustee, should be dismissed on the ground that there was either no consideration for the contract which appellees allege was entered into on or about December 26, 1961, or that this contract was expressly superseded by a subsequent contract entered into between Hank Wright's Sons, Inc. and appellant, the execution of which contract is admitted by appellees. This point will be discussed under Specification of Error 4(a) and 4(b).

The District Court apparently treated our motion for summary judgment wherein we contended that none of the three separate and distinct causes of action stated a claim upon which relief can be granted as directed jointly against all of the claims, so that if one of the claims stated a claim upon which relief could be granted our motion for summary judgment should be denied in toto (R. 40-41). We reiterate that our motion was directed individually against each claim so that a finding by this court that one of the claims does state a claim upon which relief can be granted does not call for a denial of our motion as to a claim which does fail to state a claim upon which relief can be granted.

**ARGUMENT****I**

1. The contentions of appellees applicable to the claim of Francis Wright as an individual fail to state a claim upon which relief can be granted appellee Francis Wright and the District Court erred in not dismissing said claim for the following reasons:

(a) Appellee Francis Wright does not claim that appellant breached the contract which said appellee alleges was entered into between said appellee and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

The claim of appellee Francis Wright for damages for loss of credit and lowering of his standing in the community in the amount of \$100,000 is based on an alleged contract entered into between said appellee and appellant wherein it was agreed by appellant that it would enter into a contract with a corporation to be formed by appellee Francis Wright, the terms of which contract would provide that appellant would extend credit, marketing advantages and loans sufficient to finance the proposed business to be conducted by said corporation (Contention 7, R. 14). Appellee Francis Wright does not claim that appellant breached this contract and in fact affirmatively alleges that appellant did enter into such a proposed contract with Hank Wright's Sons, Inc., the corporation formed by appellee Francis Wright, wherein appellant agreed to loan the new corporation \$40,000 for operating capital, to issue a line of credit of at least \$200,000 and to grant other discounts



and financial benefits and operating advantages without any obligation of repayment, all of which are detailed in Contention 14 (R. 15-17). Appellee Francis Wright was not a party to this contract and the fact that appellee alleges that appellant breached this second contract is immaterial.

Obviously, where a party has performed all the promises he made to the other party there can be no breach of contract and consequential damages and the fact that the party demanding such damages has expended money in performing his part of the contract or as a volunteer is beside the point. The situation claimed by appellee Francis Wright herein is no different from a situation where appellant agreed that if appellee Francis Wright would do certain work for it appellant would execute a promissory note in a certain amount payable to the John Smith Corporation. Appellant executed the note exactly as agreed upon but when the note became due appellant failed to pay the note. Certainly no one would argue that appellee could recover damages because appellant failed to pay the note. Thus the claim of appellee Francis Wright should be dismissed for the simple reason that it fails to allege a breach of the contract and instead alleges that it was fully performed by appellant.

**(b) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant and that appellant breached this contract the damages claimed for breach of this contract by appellee Francis Wright, namely, damage to his credit and impairment of his standing in the community, are not proper elements to be considered in assessing**



**damages for breach of a commercial contract of the type alleged.**

Here we enter the realm of supposition and assume that this court does not agree with our prior contention and instead finds that appellee Francis Wright alleges a breach of the contract between appellant and said appellee. The only damage claimed by appellee Francis Wright is that his credit was damaged and impaired and his standing in the community was lowered, all to his damage in the sum of \$100,000. The question then is whether damages of the nature demanded are proper elements to be considered in assessing damages for breach of a common commercial contract, namely, to enter into a contract providing for the financing of a business.

Oregon has long followed the rule of *Hadley v. Baxendale*, 9 Exch. 341 (1854) that damages to be recoverable must be such as it is reasonable to conclude were within the contemplation of both the parties at the time the contract was entered into in the event of a breach thereof. Now while the yardstick is what may reasonably have been within the contemplation of the parties at the time the contract was entered into, the law is well established that there are many situations where the court will hold as a matter of law that the damages claimed were not within the contemplation of the parties and we insist that the claim of appellee Francis Wright is of this nature.

The alleged contract was a simple and common commercial contract and there can be no argument that it would have been within the contemplation of the parties

that any tangible pecuniary loss that appellee Francis Wright suffered in performing the acts necessarily required to constitute an acceptance of the offer of appellant would be proper elements of damage but the claim here is for \$100,000 for impairment of credit and for lowering of standing in the community. As stated, this was a commercial contract in which profit was the dominant motive. In such type of contract such nebulous, uncertain, remote and speculative damages as claimed here could not reasonably be within the contemplation of the parties as a matter of law.

Moreover, just what is meant by "lowering of standing in the community"? Is a man's standing in the community dependent on the amount of money he possesses or is it dependent on his character or is it descriptive of a mental state akin to humiliation, subjective in character? The same uncertainty applies to the claim for impairment of credit. Extension of credit is usually associated with integrity, although the amount of credit obtainable is often, though not necessarily, dependent on net worth. A person's net worth would not be decreased where there has been a breach of a contract because all pecuniary damages would be recouped in an award of damages for breach of contract.

So far we have discussed the claim of appellee Francis Wright on fundamental principles of contract law for the reason that to the best of our knowledge there are no cases where a plaintiff has ever claimed damages for lowering of his standing in the community based on breach of a commercial contract and because practically

all cases dealing with impairment of credit—and they are very few—treat this claimed damage as subjective in character and akin to mental anguish, anxiety or distress, and decline to allow consideration thereof except in exceptional cases. The exceptions to the general rule that only pecuniary damages actually suffered may be considered in assessing damages for breach of contract fall into several well-defined categories where it can reasonably be said that such damages, even though subjective and dependent on a state of mind, would have reasonably been anticipated. Common cases are: breach of promise to marry, failure of a bank to honor a valid check, and failure to render medical services.

Obviously it could reasonably be anticipated that when a man jilts a lady she might suffer humiliation and mental distress. Likewise, where a bank fails to honor a valid check it could reasonably be anticipated that an inference of dishonesty would arise or even that a man's credit would be damaged. All of these exceptions allowing recovery for humiliation, etc. are situations where by the very nature of the transaction mental distress might occur and while based on breach of contract sound in tort as distinguished from breach of a commercial contract where anticipated profit is the dominant feature.

For a general discussion as to those types of cases allowing recovery for mental suffering see: *Williston on Contracts*, Rev. Ed. Vol. V, § 1340. At pp. 3769-3770 Williston states:

“Mental suffering caused by breach of contract,

though it may be a real injury, is not generally allowed as a basis for compensation in contractual actions. Pecuniary loss is the usual measure. There are, however, exceptions conceded in many jurisdictions. *Where other than pecuniary benefits are contracted for* damages have been allowed for injury to the feelings . . . unjustifiable expulsion or mistreatment of passengers by carriers, or of guests by innkeepers are illustrations. Most courts, however, go further than this. The Restatement of Contracts states that damages will be given for mental suffering for 'wanton or reckless breach of a contract to render a performance of such character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than pecuniary loss.' Illustrations of this sort, where, however, the breach cannot always be 'wanton' are *refusal to comply with a contract for medical service . . .*" (emphasis added)

The Restatement of Contracts, commented upon by Williston, under § 341 at pp. 559-560 reads as follows:

"There are two classes of cases in which damages for mental suffering are allowed: Firstly, where it accompanies a bodily injury, in which case the action may nearly always be regarded as in the field of tort; secondly, where it was caused intentionally or in a manner that is wanton or reckless. In the second class are included wanton and reckless breaches of contract of such a character that the promisor had reason to know when the contract was made that its breach would cause mental suffering, for reasons other than mere pecuniary loss. The most common contracts of this kind are engagements to marry, contracts of carriers and inn-



keepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of death messages. Even in these cases, the rule stated in this Section denies recovery of damages for mental suffering, unless the breach was wanton or reckless; mere conscious neglect to perform such a contractual duty is not enough. A pecuniary injury caused by breach of contract is likely to be accompanied by mental suffering. In some cases of *sudden poverty or bankruptcy*, the suffering may be more severe than in cases involving marriage or death; but for mental suffering so caused, no compensatory damages are given." (emphasis added)

Turning now to the few cases dealing with claimed impairment of credit, we refer this court to *Swanson v. First National Bank of Barnum*, 185 Minn. 89, 239 N.W. 900. In that case the bank agreed to pay the balance due on two mortgages, failed to do so, and foreclosure proceedings were instituted. Plaintiff brought action to recover \$5,000 general damages and \$100 special damages for time and expenses incurred in clearing up the mortgage records. On the question of general damages plaintiff offered to prove that generally after the publication of the foreclosure notice he had difficulty in obtaining credit, that many people spoke to him about his farm being foreclosed, and that he suffered extreme worry. The trial court sustained objection to this offer of proof and on appeal the court stated:

"Plaintiff invokes the rule applied in cases where a bank has been held liable for damages for wrongful refusal to pay a check drawn upon the bank, and



for wrongfully protesting a check. . . . That rule does not apply to the facts in the present case. Where a check is given by one person to another, the presumption is that the payee or holder has given value for the check, and, when payment is refused, the inference arises that the maker has given a check upon a bank in which he has not sufficient funds for the payment thereof, or that he has obtained money or property by means of a worthless check. An inference of dishonesty or crime on the part of the maker of the check could readily be drawn. Here there was no check and no refusal of payment. The same inferences could not reasonably follow.

\* \* \* \* \*

“We agree with the trial court that the action is one for breach of contract. Without alleging and proving the agreement by the bank to pay and obtain satisfaction of the mortgage, no recovery could be had. In actions for breach of contract, it is only in exceptional cases that *damages for injury to reputation*, or for mental suffering, can be recovered. The present case does not come within any of the exceptions.” p. 901 (emphasis added)

*Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803, is a case wherein plaintiff alleged two causes of action, one based on breach of contract. Plaintiff alleged that he and the defendant entered into an oral contract wherein defendant hired the plaintiff to portray and to head and lead seven of defendant’s employees in portraying the notorious payroll robbery of Brinks, a money-delivering firm of Boston, Massachusetts, as a publicity stunt in downtown Omaha. Defend-

ant agreed to notify the Omaha police of the publicity stunt so that plaintiff would not be arrested while staging the purported robbery. Unfortunately the defendant forgot to notify the police and as a result defendant and his seven companions were arrested and thrown in jail, the police not realizing it was a fake robbery. Plaintiff alleged that as a direct result of this breach of contract by defendant and his subsequent arrest and incarceration plaintiff was made the object of shame and ridicule, brought into disrepute by marring his good name and by destroying his long-enjoyed good standing and repute in the community, and that plaintiff suffered great and severe mental pain and anguish, shame, humiliation and disrepute; that the loss of plaintiff's good reputation and standing has made it impossible for him to obtain employment and by reason of the loss of good standing, good reputation and employment, plaintiff has suffered damages. In holding that the complaint failed to state a cause of action the court stated that the damages suffered by reason of the alleged breach of contract were largely in the form of mental suffering, anguish and embarrassment and that

“Damages for mental anguish are not, as a general rule, recoverable in actions for breach of contract unless the breach amounts in substance to willful or independent tort. According to the weight of authority, mental anguish is not considered as an element of recovery in an action on an ordinary contract. See 15 Am. Jur., Damages, § 182, p. 599.

“The reason why such damages are not generally recoverable is that they are too remote and could not have been in the contemplation of the parties

when the contract was made. See Annotation, 23 A.L.R. 372.

“To authorize a recovery in any case the damage must have been within the contemplation of the parties, and the defendant must have had notice when the contract was made that mental anguish might result from a default or negligence in his performance. See 15 Am. Jur., Damages, § 182, p. 602.” p. 807.

Another illustrative case is *Pfeffer v. Ernst*, 82 A.2d 763 (D.C. 1951), which was an action for breach of contract to hire. Damages claimed: mental shock. In denying recovery the court said:

“We think this case is governed by the general rule that in case of breach of contract a plaintiff's recovery is limited to such injuries as are the direct result of the breach and which could reasonably have been contemplated or expected by the parties. As was said in a recent case, *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E.(2d) 810, 813: ‘Contracts are usually commercial in nature and relate to property or to services to be rendered in connection with business or professional operations. Pecuniary interest is dominant. Therefore, as a general rule, damages for mental anguish suffered by reason of the breach thereof are not recoverable. Some type of mental anguish, anxiety, or distress is apt to result from the breach of any contract which causes pecuniary loss. Yet damages therefor are deemed to be too remote to have been in the contemplation of the parties at the time the contract was entered into to be considered as an element of compensatory damages.’ This rule of law seems to be well established.”

In *Independent Grocery Co. v. Sun Insurance Co.*, 146 Minn. 214, 178 N.W. 582, plaintiff alleged that plaintiff and defendant agreed upon the amount of a fire loss in a specified sum but notwithstanding this agreement defendant refused to pay the amount agreed upon so that the plaintiff was compelled to bring action to recover, after the institution of which action the defendant insurance company paid the agreed amount. The present action was brought to recover damages for loss suffered by the delay, including loss of good will and inability to pay creditors. In holding that the complaint failed to state a cause of action the court stated:

“The complaint also alleges that the delay in the settlement and payment of the loss was ruinous to plaintiffs’ business and the good will thereof; that to maintain the same and to hold their former trade an immediate resumption of the business was necessary; that they needed the insurance money to pay the demands of pressing creditors, as defendants well knew; that defendants wrongfully detained the possession of the store building after the fire an unreasonable time and until plaintiffs’ patrons had turned elsewhere and the good will of the business had been lost.

\* \* \* \* \*

“The importance of the question presented, in a measure at least, is found in the unusual character of the suit, and the courage with which it stands forth in challenge of established rules of law controlling rights and liabilities in actions involving breach of contract obligations. Though the complaint abounds in allegations and charges of malice



and intentional wrongdoing on the part of defendants, the action is not one in tort, but one for the recovery of damages for a breach of the contract, and the rule of liability in actions of that kind must control the rights of the parties.

“The general rule of damages for the breach of contract obligations is well-settled law in this state. It limits the rights of the complaining party to compensation for such loss as results naturally and proximately from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into. 1 Dunnell’s Dig. 2559; *Paine v. Sherwood*, 21 Minn. 225; *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. 153. The facts presented do not bring the case within the rule. Neither the loss of trade nor the inability of plaintiffs to pay their creditors, or even that they were likely to have creditors in the event of a destruction of the insured property by fire, or the loss of the good will of the business, flowed naturally or proximately from the delay of defendants in adjusting and paying the loss; nor can it be said that the financial condition and business situation of plaintiffs as pictured by the complaint was within the contemplation of the parties when the contract was entered into. Those facts therefore furnish no basis for the recovery of damages, for as to the breach of the contract, whether malicious or not, plaintiffs’ recovery, within the rule stated, must be limited to the amount of the legal liability under the policy with interest.” p. 582-83.

While the above case is not exactly comparable with our case, it does discuss loss of good will and inability to



meet the demands of creditors. If such loss was not within the contemplation of the parties when the defendant agreed to immediately pay the claim and failed to do so then certainly the damages claimed by appellee Francis Wright could not have been within the contemplation of the parties.

To hold that in assessing damages for breach of a purely commercial contract a jury might find that loss of credit and lowering of standing in the community was reasonably within the contemplation of the parties would assimilate the rule relating to damages in tort actions and permit damages for mental suffering and everything akin thereto in every case of the breach of a commercial contract. We submit that this court should hold as a matter of law that such remote, uncertain and speculative damages were not within the contemplation of the parties at the time of the execution thereof.

**(c) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant, that appellant breached this contract, and that damages for loss of credit and impairment of standing in the community are proper elements to be considered in assessing damages, title thereto would pass to the trustee in bankruptcy for Francis Wright.**

It is with misgivings that we discuss this Specification of Error because this court might construe such specification as a confession of weakness of the other reasons advanced that the claim of Francis Wright fails to state a claim upon which relief can be granted. Such is not intended but we must recognize that lawyers are not infallible, and in addition, we believe a discussion

of who was vested with the title to the cause of action and claimed damages, loss of credit and lowering of standing in the community, will further emphasize our position that loss of credit and lowering of standing in the community are not proper elements to be considered in assessing damages for breach of a commercial contract.

Whether the claim for damages asserted by appellee Francis Wright did or did not pass to his trustee in bankruptcy is determined by Section 70(a) of the Bankruptcy Act, Title 11 U.S.C.A. Section 110(a), the pertinent portions of which provide that the trustee of a bankrupt shall "be vested by operation of law with the title of the bankrupt . . . to all of the following kinds of property wherever located. . . .

\* \* \* \* \*

"(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process:

\* \* \* \* \*

"(6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property;"

There can be no argument that under the pleadings in this case the claim of appellee Francis Wright and the claim of Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, are based on "rights of action arising upon contracts"—in fact both claims arose out of a purported breach of the same contract. There would have been only one claim had bankruptcy not intervened wherein Francis Wright would have claimed damages for breach of contract, the elements thereof being first a claim for money and labor expended by him in performing the acts which constituted acceptance of appellant's offer, and second, damages for impairment of credit and lowering of his standing in the community. Certainly from the pleadings in this case all damages accrued from a breach of an indivisible contract and would pass to the Trustee in Bankruptcy under 11 U.S.C.A. Section 110(a)(6).

Here we have the situation where appellee Matt S. Hughes, Trustee, concedes and appellee Francis Wright claims that the damages which arose out of the breach which dealt with loss of credit and lowering of standing still remain vested in appellee Francis Wright, but that all the other damages which arose out of the same contract passed to the Trustee. Since both of these appellees appear in agreement, they will probably contend that this court should look to the substance and not to the form of the action and that the claim of appellee Francis Wright is really a property right arising out of a cause of action *ex delicto* akin to a cause of action for injuries to the person which does not pass to the trustee

under the proviso clause of 11 U.S.C.A. Section 110(a) (5), and will point to such cases as *Boudreau v. Chesley*, 135 F.2d 623 (First Circuit, 1943). In this last case the plaintiff-bankrupt brought action against defendants alleging a malicious conspiracy to ruin the plaintiff's reputation, to drive him out of the banking business, and to deprive him of his livelihood, and to this end committed wrongful acts, such as making false representations to the Comptroller of the Currency, and others. One of the specific items of damages was "further damaged by loss of his credit standing and his reputation for integrity and honest dealing." The plaintiff-bankrupt effected a settlement with the defendants and his trustee in bankruptcy brought action to sequester the settlement amount. The court quite properly held against the trustee as title to the cause of action did not pass to the trustee under "(6) rights of action arising upon contracts" but remained vested in the bankrupt under the proviso to (5), a right of action *ex delicto*. But that is not our case here, for the damages claimed by appellee Francis Wright are based solely on a breach of contract.

In *Tamm v. Ford Motor Co.*, 80 F.2d 723 (Eighth Circuit, 1935) plaintiff-trustee brought action alleging a claim which the court said was difficult to decide whether it was an action *ex delicto* or *ex contractu*, but the court reached the conclusion that the action was founded on a contract between the bankrupt and defendant and that by reason of the breach thereof by defendant the bankrupt lost all his property, became insolvent, and was forced into bankruptcy, and that the title thereto



vested in the trustee, and the fact that the bankrupt was induced to enter into the contract by fraud and misrepresentation was immaterial. Thus the court, while looking to the substance, found that since the cause of action arose out of a contract title thereto and the right to recover resultant damages passed to the trustee, which is our case.

Therefore, if anyone has a right to recover damages it is the trustee, but it seems ridiculous to us to claim a breach of contract and then when it comes to the question of damages to say: we admit that the right of action arises upon a contract, but since some of the damages claimed for breach thereof are personal to the plaintiff, you must split the damages into two segments and treat the damages claimed by appellee Francis Wright as property arising out of a right of action *ex delicto*, title to which does not vest in the trustee.

We submit that the impossible position taken by the appellees wherein the trustee in bankruptcy says: I don't claim the damages caused by the breach of the contract relating to credit and standing because they constitute injuries to the person of appellee Francis Wright, but I do claim all the other damages arising out of the breach, is just about as strong an argument as we can think of in support of our prior contention that damages for loss of credit and lowering of standing in the community could not reasonably have been within the contemplation of the parties at the time the contract was entered into.



**(d) The claimed contract between appellee Francis Wright and the appellant was void because of indefiniteness and uncertainty.**

The offer of appellant to enter into a unilateral contract was simply an agreement to enter into a contract with a corporation to be formed by appellee Francis Wright, the terms of which would provide that appellant "would extend credit, marketing advantages and loans sufficient to finance the proposed business, all as hereinafter set forth" (Contention 7, R. 14). We believe that the phrase "all as hereinafter set forth" can only relate to the terms of the second contract that were actually embodied in that contract alleged to have been entered into on or about December 26, 1961 (Contentions 13, 14 and 15, R. 15-18), and that at the time the first contract was entered into in early October 1961 the words uttered by appellant were simply that the terms of the second contract would provide for credit, marketing advantages and loans sufficient to finance the proposed business.

It is obvious that this offer of appellant was so uncertain and indefinite that it could not possibly serve as the basis of a valid contract. Could a court determine from the terms of this alleged contract any of the requisite elements, such as duration of the contract, terms of payment, amount of loan, extent of credit, territorial extent, and obligations of the corporation? And in the event appellant declined to enter into a contract with the proposed corporation how would a court assess damages? We are therefore not citing any authorities be-

cause we believe that our contention is self-evident. However, if this court finds that the phrase "as hereinafter set forth" means that the actual promises that were made by appellant in the contract between Hank Wright's Sons, Inc. and appellant entered into on or about December 26, 1961, were actually uttered in early October 1961 we will show in our discussion of Specification of Error 3(a) that these terms were still so indefinite and uncertain as not to constitute a valid contract.

## II

**2. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in bankruptcy for Francis Wright, and the district court erred in not dismissing said claim for the following reasons:**

**(a) Appellee Matt S. Hughes, trustee in bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between appellee Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.**

**(b) The claimed contract between appellee Francis Wright and Appellant was void because of indefiniteness and uncertainty.**

Since the contract upon which Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, is relying is the same contract as that relied upon by appellee Francis Wright and the claims are identical except as to the respective damages claimed, all of our arguments in support of our position that the claim of appellee Francis

Wright fails to state a claim upon which relief can be granted apply with equal force to our contention that the claim of Matt S. Hughes, Trustee, fails to state a claim upon which relief can be granted, with the exception of our discussion as to who, if anyone, was entitled to recover damages for loss of credit and lowering of standing in the community (Argument under Specification of Error 1(c)).

### III

**3. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in Bankruptcy for Hank Wright's Sons, Inc., and the district court erred in not dismissing said claim for the following reason:**

**(a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty.**

This specification of error deals with the second contract, the bilateral contract between Hank Wright's Sons, Inc. and appellant entered into "on or about December 26, 1961" (Contentions 13, 14 and 15, R. 15-18). However, if this court holds that the offer of appellant made in early October 1961 to enter into a unilateral contract with appellee Francis Wright (Contentions 6 and 7, R. 14) actually included the exact promises made by appellant in the above bilateral contract because of the phrase "all as hereinafter set forth" (Contention 7, R. 14), then the argument under this specification of

error should be considered by the court in determining Specifications of Error 1(d) and 2(b).

The criterion of whether any particular contract is enforceable against the claim of being too indefinite and uncertain has been stated:

“To create a contract the minds of the parties must meet as to every essential term of the proposed contract and there must be a clear and unequivocal acceptance of a certain and definite offer in order that such offer may become a contract. *Joseph v. Donover Co.*, 9 Cir., 1958, 261 F.2d 813; *Deering-Milliken & Co. v. Modern-Aire of Hollywood, Inc.*, 9 Cir., 1955, 231 F.2d 623.

“Oregon follows the same rule. *Klussman v. Day*, 107 Or. 109, 213 P. 787, rehearing denied 214 P. 348. An offer, to become a contract, must be accepted. *Maeder Steel Products Co. v. Zanello*, 109 Or. 562, 220 P. 155; *Medford Furniture & Hardware Co. vs. Hanley*, 120 Or. 229, 250 P. 876. A meeting of the minds on each and all of the essential elements is indispensable to the creation of a contractual relationship. *Kretz v. Howard*, 220 Or. 73, 346 P.2d 93.” *Cook v. The MV Wasaborg*, 189 F. Supp. 464 at P. 468.

“Every contract must be definite and certain as to the terms to be performed by either party, and, if it is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, the court cannot enforce it; and since there is no obligation there is no contract. If the contract in any case is so indefinite as to make it impossible for the court to decide just what it means, and fix exactly the legal liability of the parties, it cannot



result in an enforceable contract." *Gaines v. Vandecar*, 59 Or. 187, 115 Pac. 721; 115 Pac. 1122, p. 193.

"An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." *Restatement of the Law, Contracts*, § 32.

"A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforceable contract." *Corbin on Contracts*, § 95.

The last three citations are quoted with approval in *Bonnevier v. Dairy Cooperative*, 227 Or. 123, 361 P.2d 262.

Turning now to the terms of the bilateral agreement (Contentions 14 and 15, R. 15-18) we will point out some of the reasons why this contract is unenforceable with quotations from pertinent cases.

One of the essential elements of any contract is the time element—commencement and duration. The alleged contract does not state when performance was to commence but from Contention 16 (R. 18) it may be argued that performance under the contract was to commence



immediately after execution. But what about the duration? The contract is absolutely silent as to how long the obligations of each of the parties were to continue. Is it terminable at the will of either party, in which there never was a binding contract? Was it to continue six months, five years, or ten years? The only thing certain was that the contract was not to continue forever, but other than this no one can tell the duration thereof.

Representative cases illustrating this point — and we have mainly selected cases dealing with agency agreements because in Contention 14(c)(10) (R. 17) appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., claims a promise by appellant to grant "certain franchise rights in a specific Oregon area" (R. 17).

In *Jordan v. Buick Motor Co.*, 75 F.2d 447 (7th Circuit) plaintiff alleged that the defendant promised to grant plaintiff an exclusive agency to sell and service Buick automobiles and also promised to provide a showroom for this purpose free of charge if plaintiff would procure additional capital in the amount of \$40,000. Plaintiff procured the \$40,000 and for a short period defendant provided a showroom but refused to grant the exclusive agency. Plaintiff sued defendant for breach of contract and the court, after citing Section 32, *Restatement of the Law, Contracts*, supra, set forth several reasons why the contract was too indefinite and uncertain, including "neither the time when the contract was to begin, nor the period for which it was to be effective, appears."

In *Curtiss Candy Co. v. Silberman*, 45 F.2d 451 (6th Circuit), plaintiff alleged that defendant promised to grant plaintiff the exclusive right to distribute defendant's candy and from time to time bought candy. In holding for the defendant the court said:

"The evidence discloses no express manifestation of intent upon the subject of time. It is true that at the initial interview with defendant's salesman the plaintiffs inquired whether the promise of exclusive territory was to be considered as a temporary or a permanent arrangement, and were assured that it was intended to be permanent. But when the oral agreement was reduced to written form, by securing home office confirmation, nothing was said upon this subject." p. 452-453.

In *Chappel v. F.A.D. Andrea, Inc.*, 41 Ga. 413, 153 S.E. 218, defendant entered into an agency agreement for the exclusive right to sell defendant's radios as long as there was a "reasonable demand" for said radios. The court held the contract unenforceable because the duration of the contract was indefinite, for who was to determine what constituted "reasonable demand"? "It cannot amount to a permanent contract, but even if it should, it has been held that such a contract is terminable at will."

In *Tamm v. Ford Motor Co.*, 80 F.2d 723 (8th Circuit) at p. 729 the court stated:

"If the petition shall be considered as an action based on a breach of a written contract, of which it bears some earmarks, then plaintiff fares no better. For the contract of which only a fragment is set out

in the petition does not, we repeat, bind the defendant to sell any given number of cars, trucks, or parts thereof to the bankrupt, nor does it fix any period whatever to its duration."

One of the obligations of the contract was a promise by appellant "to furnish necessary merchandise for its business activities" (Contention 14, R. 15-16) and the counterpart was a promise by Hank Wright's Sons, Inc. "to buy from defendant or have available a sufficient quantity of defendant's products to meet the demands of the market in its operating area" (Contention 15(b), R. 17).

Who is to determine what merchandise and what quantity is necessary? What was the price to be paid by Hank Wright's Sons, Inc. for the "necessary merchandise"? While the appellant promised to authorize a line of credit of at least \$200,000, when was payment for the merchandise to be made? Other various and sundry extra discounts were promised but the base price to be paid for merchandise is nowhere stated.

A representative case holding that the "price" must be definitely stated and that a "reasonable price" cannot be inferred is *Raisler Sprinkler Co. v. Automatic Sprinkler*, 36 Del. 57, 171 A. 214. Hank Wright's Sons, Inc. is not even obligated to buy merchandise from the appellant since it could either buy merchandise from the appellant or procure it from other sources. Who is to determine whether the corporation (and by the use of the word "corporation" we have reference to Hank Wright's Sons, Inc.) has a "sufficient quantity of de-

fendant's products"? And who is to determine the "operating area"? Coupled with this is an alleged promise to designate the corporation "associate dealer on the east side of the Willamette River for the Portland area, and would give it certain franchise rights in a specific Oregon area". What is meant by an "associate dealer" and what were the "franchise rights" that were to be granted and what was the "specific Oregon area" to which the franchise right was to apply?

It should be borne in mind that the contract in question cannot be interpreted as a "requirement" contract as the business to be established by the corporation was new.

Turning now to the promise to loan \$40,000 for operating capital: When was this loan to be made? The most that can be said is that the money was to be advanced in installments, for in Contention 17 (R. 18) the bankruptcy trustee alleges that defendant refused to furnish the first \$10,000 cash due under the contract. Assuming that \$10,000 was due forthwith, when was the remaining \$30,000 to be paid, and what is more important, when was the \$40,000 to be repaid and what was the interest rate?

In *Garcin v. Granville Iron*, 244 N.Y.S. 145, plaintiff sued on a note signed by the defendant and defendant as a defense and as a counterclaim alleged an agreement on the part of the plaintiff to finance the business in a larger amount than the note sued upon and claimed that the instant note was only a part of a larger obligation. Disposing of this contention the court said:



“The agreement does not specify the nature of the advances to be made or the terms. Was the plaintiff to make loans upon notes of the corporation, or was he to purchase shares of stock. If it was intended that the financing should assume the form of loans or the purchase of notes, at what discount were the notes to be taken? When were the loans to be made? What rate of interest should they bear? When would they mature, and what security was to be given? If the financing was to consist of the purchase of stock, what was to be the class of stock, and what were to be its preference? At what price was it to be purchased? Contracts more definite than this have been held void for lack of certainty.”

In *Wilcox, Inc. v. Shell Eastern*, 283 Mass. 383, 186 N.E. 562, the court stated:

“The instrument provides nothing as to the time of payment or terms of payment by the plaintiff.”

The same remarks apply to the promise to extend a line of credit of at least \$200,000.

Turning now to the obligation to furnish “without any obligation of repayment” \$2,000 for identification of plaintiff’s equipment and building as being a dealer for defendant and \$3,000 for advertising within the first year, and to “furnish cooperative advertising in which the defendant would pay 75% of the cost and the plaintiff would pay 25% of the cost” (Contention 14(c)(1), (2) and (5), R. 16), just what identification was to be placed on the equipment and building and how should the amount be divided between equipment and building? Who was to determine the medium for the \$3,000 ex-



penditure for advertising the first year and who would determine the nature of the cooperative advertising?

In *Wilcox, Inc. v. Shell Eastern*, 283 Mass. 383, 186 N.E. 562, the court, in holding a contract unenforceable because too indefinite and uncertain, stated:

“The defendant was to pay for all newspaper and billboard advertising and a ‘portion of the cost of direct mail advertising’ but there is nothing to indicate how the questions whether or not any advertising was to be done, what was to be advertised or the extent of such advertising were to be determined. If there should be direct mail advertising, however, that question might be determined, the defendant was to pay some portion thereof, although there is no indication as to what portion of the cost. There is nothing in the record which enables the court to interpret and apply this part of the instrument.”

Turning now to the promises for discounts: (Contention 14 (c)(3), (7), (11), R. 16-17), who was to determine the prices on which the discounts would be based, and what particular top-line brand was to be excepted?

Another of the purported obligations of appellant was to furnish \$1,000 by reclassifying 200 Safeway brand highway tires as “seconds,” (Contention 14(c)(6), R. 16). Even assuming that by extrinsic evidence Safeway brand highway tires can be shown to be top-line tires, what was the appellant required to do in order to furnish \$1,000 without any obligation of repayment?

Turning now to the miscellaneous promises: (Contention 14(c)(8), (9), and (12), R. 16-17), who would

determine what constituted a "giant tire service truck"? What was the nature of the assistance that appellant should render the corporation in bidding on road construction jobs—was appellant to make a cost estimate after inspecting the prospective job or merely to answer any questions put to it by the corporation with reference to the prospective job? Who was to determine the amount that appellant should pay the employee of the corporation while working for appellant and who was to determine when this employee's services were needed by the corporation?

The cases that we have heretofore cited for reference on a particular point often hold the contract that was before the court unenforceable on the particular point we quoted. Here we find not one but many indefinite and uncertain provisions. Further, when we consider the promises of Hank Wright's Sons, Inc. (Contention 15, R. 17-18) which were the purported consideration for the promise of appellant we find only a generalized promise to use its best efforts to further the sale of appellant's merchandise and to maintain facilities and a sales organization sufficient to meet the demands of the market in its area.

In conclusion we quote from *Tamm v. Ford Motor Co.*, *supra*, at p. 730:

"This may under the facts involve a hardship, but the time to guard against such hardships is when men make improvident contracts, and not when such contracts come before the courts. This thought was well expressed by Judge Parker in the late case of *Ford Motor Co. v. Kirkmyer Motor Co.*, *supra*, 65 F. (2d) 1001, page 1006, wherein he says:

“It appears that plaintiff has been disappointed in its expectations and has been dealt with none too generously by the defendant; but, while we sympathize with its plight, we cannot say from the evidence before us that there has been a breach of binding contract which would enable it to recover damages. While there is a natural impulse to be impatient with a form of contract which places the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from the provisions of contracts which they have made for themselves. Dealers doubtless accept these one sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them; but, after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect the courts to place in the contracts the protection which they themselves have failed to insert.’”

#### IV

4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., without prejudice to appellant's counterclaims should be granted for the reason that:

(a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant; or

**(b) Said contract was expressly superseded by the bilateral contract between Hank Wright's Sons, Inc., and appellant entered into December 27, 1961.**

Specification of Error 4(a) and (b) need not be considered by the court if the court rules in appellant's favor on Specification of Error 3(a).

The point covered by these specifications of error involves elementary contract law which needs no citation of authorities. The contract on which Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., is relying is the bilateral contract between that corporation and appellant entered into "on or about December 26, 1961" (Contentions 13, 14 and 15, R. 15-18). The promises made by Hank Wright's Sons, Inc., which are claimed to be the consideration for the promises of appellant are:

"15. That by the terms of said contract, the plaintiff Hank Wright's Sons, Inc. promised to the defendant to:

- (a) Use its best efforts to further the sales of defendant's products,
- (b) To buy from defendant or have available a sufficient quantity of defendant's products to meet the demands of the market in its operating area, and
- (c) Maintain an inventory, warehouse and re-treading facilities and sales organization sufficient to meet the demands of the market in its area." (Contention 15, R. 17-18)

Under date of December 27, 1961 Hank Wright's Sons, Inc., and appellant entered into a written contract



entitled "United States Dealer's Consignment Agreement" being Exhibit A attached to the Pretrial Order (R. 24-28). Appellees admit the execution thereof (R. 23). Paragraph 19 of Exhibit A (R. 27) provides as follows:

"19. In consideration of the execution of this agreement by the Consignor, and of the prices, allowances and terms herein extended by the Consignor to the Consignee, the Consignee shall among other things:

(a) Use his best efforts to sell the Consignor's United States Brands of tires, tubes, batteries, camelback, repair materials, and line of accessories, shall specialize in the sale of same, and shall not offer or attempt to substitute the merchandise of any other manufacturers when United States Brands are asked for by the customer.

(b) Maintain at PORTLAND, OREGON, a suitable and adequate place of business, identified and advertised as a distributing center for the Consignor's merchandise, displaying signs and advertising furnished by the consignor thereon.

(c) Maintain an adequate stock of the Consignor's brands of the above mentioned merchandise on hand at all times so as to be in a position to supply promptly the immediate and forward requirements of its trade.

(d) Maintain adequate and suitable service facilities for the handling of all types of tire service; also employ the necessary manpower to accomplish market objectives as determined by the Consignor from time to time.



(e) Exert his best efforts to obtain from his immediate market a volume of business that shall be satisfactory to the Consignor and consistent with the objectives agreed upon from time to time between the Consignor and the Consignee as a reasonable measure of available sales potential.

(f) Handle Customer Claims involving the Consignor's merchandise in accordance with the terms of its policy in effect from time to time for handling Customer Claims."

A perusal of the promises made by Hank Wright's Sons, Inc. under both contracts shows that the promises made by Hank Wright's Sons, Inc. were the same under both contracts.

"On or before December 26, 1961" would permit proof of the execution within a reasonable time either prior to or subsequent to December 26, 1961. Now if the proof adduced by appellees shows that the contract they claim was entered into on or about December 26, 1961, was actually executed subsequent to the admitted contract, Exhibit A, there was no consideration whatsoever for the promises of appellant since Hank Wright's Sons, Inc. were already obligated to appellant to perform all the acts which were the consideration for appellant's promises and the contract alleged by appellees would be void for lack of mutuality.

On the other hand if the admitted agreement, Exhibit A, was executed subsequent to the contract entered into on or about December 26, 1961, this agreement would supersede the agreement relied upon by appellee

Matt S. Hughes, Trustee for Hank Wright's Sons, Inc. because of the repugnancy in the terms of the two contracts and because it so specifically provides:

"25. This agreement shall supersede all agreements previously made between the parties on the subject of the furnishing, selling or consignment of tire merchandise. All merchandise shipped by the Consignor to the Consignee after this agreement becomes effective shall be received by the Consignee as consigned merchandise under this agreement." (R. 28).

We appreciate that the basis for this Specification of Error should be a motion for judgment on the pleadings and no such formal motion has been made. However in the Pretrial Order appellant did raise this point (Defendant's Contention 8, R. 21) and since such a motion may be made any time prior to trial, we believe that the court should rule thereon if the court rules adversely to appellant on its Specification of Error 3(a).

## CONCLUSION

We submit that the claim of appellee Francis Wright and the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, each of which is based on the same contract, should be dismissed for failure to state a claim upon which relief can be granted because:

1. No breach of the alleged contract is claimed;
2. The alleged contract is too indefinite and uncertain to constitute a valid contract; and

In the event the court rules adversely to appellant on both of the foregoing contentions the claim of appellee Francis Wright still should be dismissed because the only damages claimed: loss of credit and lowering of standing in the community, are not proper elements to be considered in assessing damages for breach of a purely commercial contract, and even if they are, appellee Francis Wright has no title thereto.

The claim of Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. should be dismissed for failure to state a claim upon which relief can be granted because the alleged contract is too indefinite and uncertain to constitute a valid contract. If this court holds adversely to this contention the claim still should be dismissed because of failure of consideration or because the contract was superseded by a later agreement, depending on whether appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. takes the position that the admitted contract, Exhibit A, was entered into prior or subsequent to the contract alleged by appellees.

We believe that all three claims should be dismissed, but, as we have heretofore pointed out, a holding that one of the claims does state a claim upon which relief can be granted does not preclude a favorable ruling on the other claims.

Respectfully submitted,

ARTHUR S. VOSBURG

FRANK MCK. BOSCH

VOSBURG, JOSS, HEDLUND & BOSCH

Attorneys for Appellant

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

**FRANK MCK. BOSCH**  
of Attorneys for Appellant

NO. 20235

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

RAMONA CIPRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Appeal from the United States District Court for  
the Southern District of California,  
Central Division

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APPELLANT'S OPENING BRIEF

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FILED  
OCT 21 1975  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
LOS ANGELES





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IN THE  
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RAMONA CIPRES,

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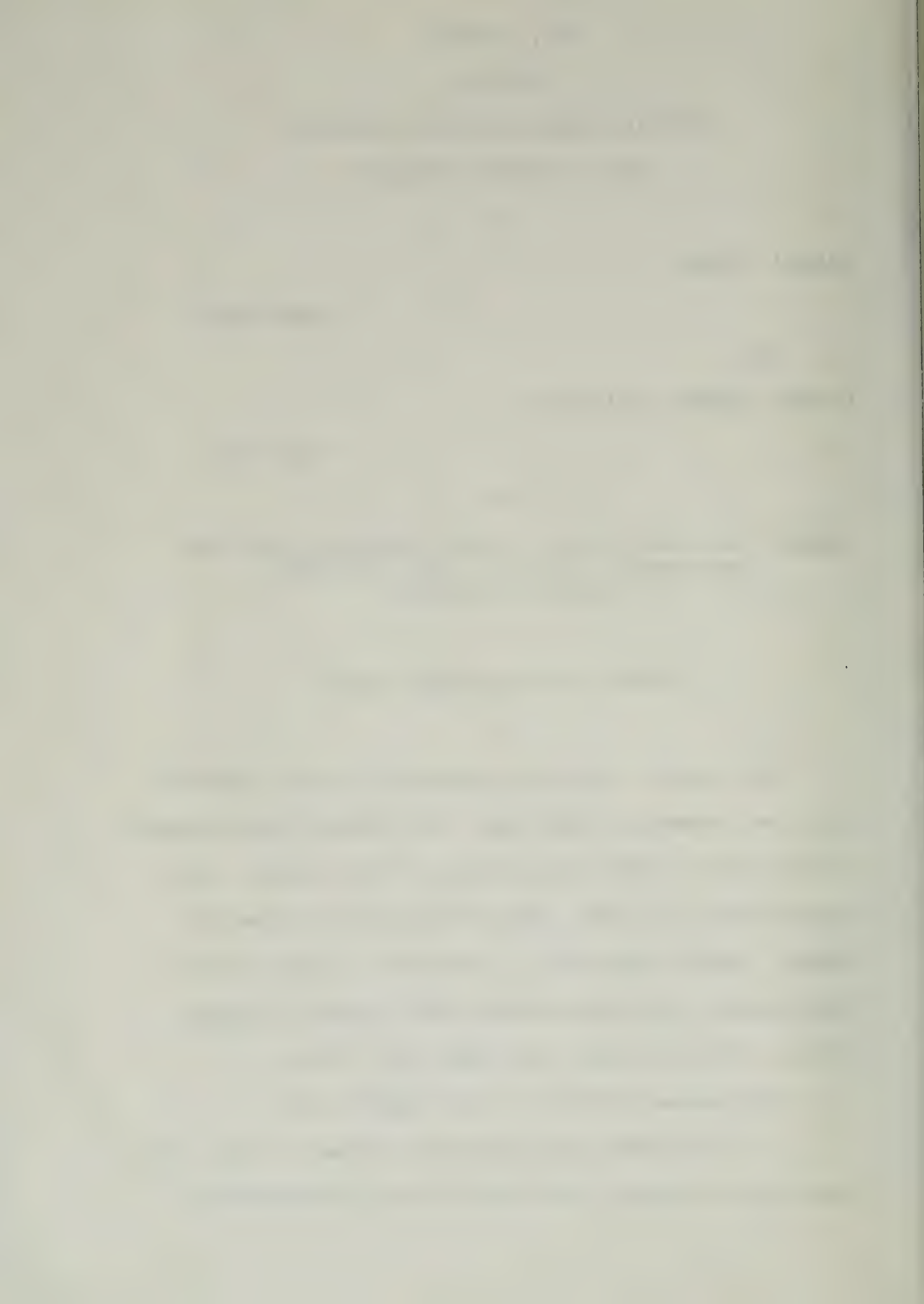
APPELLANT'S OPENING BRIEF

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This appeal is from a decision of the District Court on remand of this case for further proceedings in accordance with the opinion of this Court, rendered March 18, 1965, which decision is attached hereto, marked Appendix A, and made a part hereof. This appeal is in accordance with Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).

The issues raised by this appeal are:

1. "The court must determine from all the circumstances whether the verbal assent reflected an



understanding, uncoerced and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld."

(Opinion, p. 3)

2. Whether at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, and that removal of the evidence was threatened.

3. Whether the ruling of the court below, in refusing to compel the government to name the informer in order to determine whether that informer was trustworthy or could or did supply reliable information, was prejudicial error.

### JURISDICTION

Jurisdiction is conferred by Title 21, Section 176a and by Title 28, Section 2107, U.S. Codes, and by the order of this Court in case entitled Ramond Cipres v. United States of America, No. 19217, decided March 18, 1965 and remanding the case to the District Court for further proceedings in accordance with the opinion rendered by this Court on March 18, 1965. (Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963))



STATUTES INVOLVED

Fourth Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

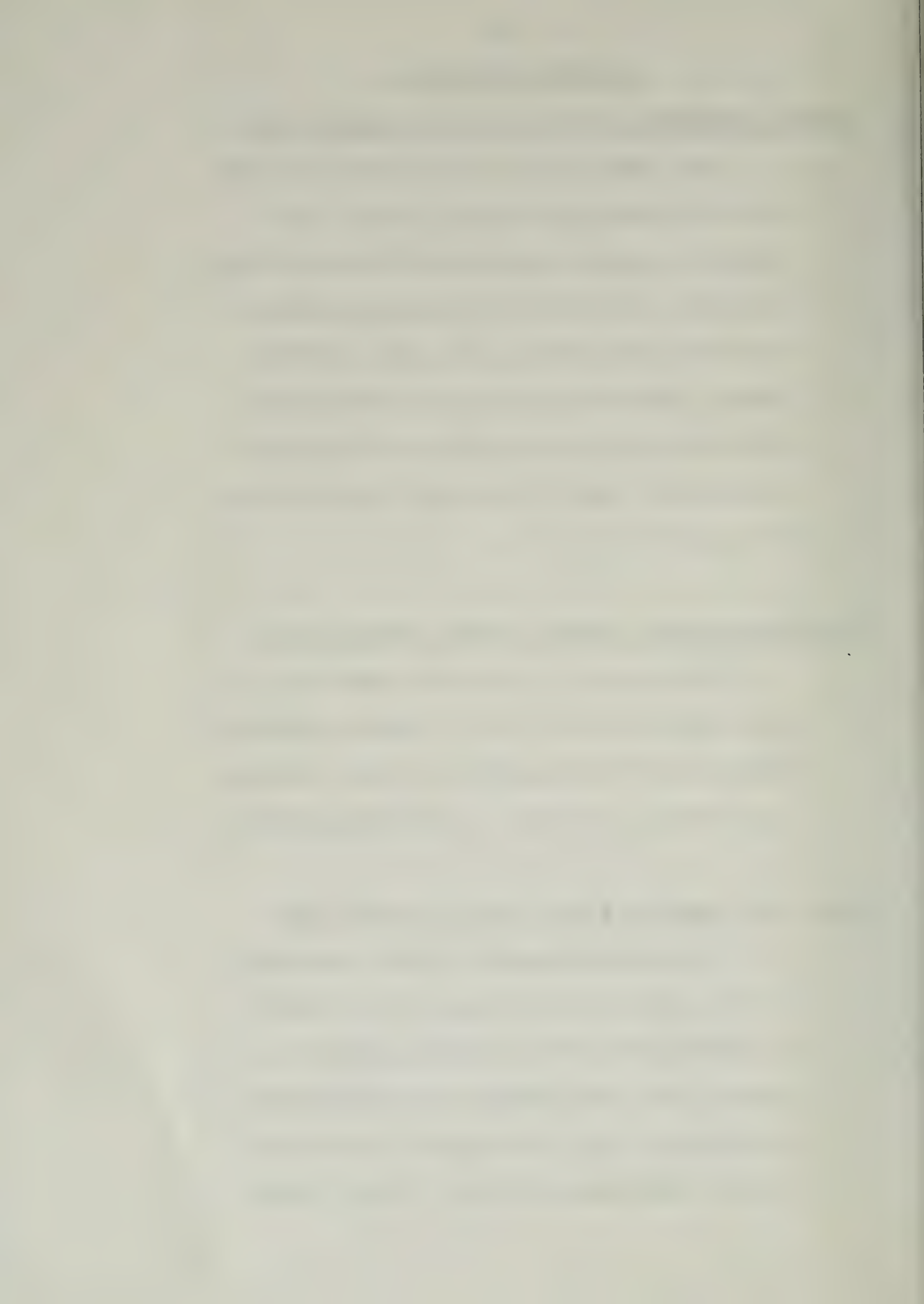
Fifth Amendment, United States Constitution:

"No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

Title 21, Section 176a, United States Code:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States





marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.



"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

"For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954."

#### STATEMENT OF FACTS

The facts are contained in the previous brief and are supplemented by the facts set forth below.

The court held a hearing on the issues herein on May 18, 1965, and said hearing is the basis of the reporter's transcript of 130 pages. The court also made findings of fact, in which it found, among other things:

"The Court finds inasmuch as there was no additional evidence presented by the plaintiff to the point that defendant Cipres had not been warned of her constitutional immunity from unreasonable search and seizure, and, in light of all the facts, did not intentionally relinquish a known right and privilege."

The court also found that the search by the





Customs' agent and police sergeant at the Los Angeles International Airport on September 17, 1963 was at all times reasonable and prudent and further found "from all evidence in the case that at the time the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that defendant Cipres was committing an offense and that removal of the evidence was threatened."

The court further found that the search was valid as incident to a substantially contemporaneous arrest, for the officers had probable cause for the arrest at the time of the search and the circumstances suggested that immediate search was necessary to preserve the material subject to seizure.

The court then concluded that the defendant Cipres was not entitled to relief and that her constitutional rights were not violated.

There was no finding on the question of the informant.

During the course of the hearing the government placed on the stand Neal Ellsworth Greppin to testify, as a Customs' agent, that he worked with Sgt. Beckman of the Los Angeles Police Department. His testimony related solely to Juan Montes DeOca, a



co-defendant. Greppin testified that he received his information from a reliable informant (R.T. 26) and that the reliable informant would not include an anonymous letter that came to the office in San Diego. (R.T. 26)

"Q. What, sir, were the name or names of the reliable informants who gave you information relating to Mr. DeOca?

The government objected and the court said:

"Here is a defendant, or here are two defendants, who claim that the arrest was unlawful, the search was illegal. The only way to justify the search of the arrest seems to me is by probable cause. He says one of the items of probable cause is an informant, a reliable informant. I think the witness has correctly testified that a reliable informant is one who has previously given information which they found to be reliable. It seems to me that the question 'Who was this man' is a perfectly legitimate question...

"THE COURT: This question has arisen on numerous occasions and I have known of instances where the government has dismiss-



ed rather than reveal the name of the confidential informant. But my information is that the government has always been required to reveal the name.

"MR. VAN DE KAMP: I don't believe that is completely accurate, your Honor."

The court requested government counsel to produce any citations and after further argument and on the basis of U.S. v. Rugendorf, 316 F.2d 589, the court sustained the objections of the government to giving the defense the name of the informer, although the court quoted from Roviaro v. United States, 353 US 53.

#### SPECIFICATION OF ERRORS

Appellant specifies the following errors on appeal:

1. The court erred in holding that the appellant's constitutional rights were not violated.

2. The court erred in holding that at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense or had any guilty knowledge that any offense was committed and that removal of



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the evidence was threatened.

3. The court erred in holding that the government did not have to disclose the name of the informant without collaterally dismissing the case and discharging appellant.

### ARGUMENT

#### I

THE COURT ERRED IN HOLDING THAT  
THE APPELLANT'S CONSTITUTIONAL  
RIGHTS WERE NOT VIOLATED.

The court correctly found from all the circumstances in the case that the defendant Cipres had not understandingly, uncoerced and unequivocally elected to grant the officers a license which she knew could be freely and effectively withheld.

This point was conceded by the government and found by the court below in favor of the defendant.

#### II

THE COURT ERRED IN HOLDING THAT AT  
THE MOMENT THE BAGS WERE SEARCHED  
THE OFFICERS HAD REASONABLY TRUST-  
WORTHY INFORMATION OF FACTS SUFFIC-  
IENT TO WARRANT A PRUDENT MAN IN



BELIEVING THAT CIPRES WAS COMMITTING AN OFFENSE OR HAD ANY GUILTY KNOWLEDGE THAT ANY OFFENSE WAS COMMITTED AND THAT REMOVAL OF THE EVIDENCE WAS THREATENED.

The court held that at the moment the bags were searched the officers had reasonably trustworthy information of facts to believe that Cipres was committing an offense. Here she was at the airport, covered with the presumption of innocence. There was at that moment no evidence that she at any time had any knowledge that she was committing any offense or that she had any knowledge that any offense was being committed.

There was nothing to show that she had any knowledge of the contents of the bags at any time. Guilty knowledge of their contents was just as essential to establishing that she was committing an offense as any other fact sufficient to warrant a prudent man in believing that she was committing an offense.

She was in no different position than the defendant in People v. Gory, 28 Cal.2d 450, 170 P.2d 433, where the defendant, in a prison camp, did not know the contents of a bag and there was no showing





of any guilty knowledge of its contents. That Cipres was arrested prior to any search is shown by the evidence that the officers were detaining her and questioning her and that the contents of the bags was not known was clearly shown by the officer trying to smell the contents to speculate by an odor which he claimed was familiar to him, namely, that of marijuana. The other bag was subsequently opened at the airport. Both bags, although unlocked, required inspection and examination to determine their contents, although at the very moment that Cipres was arrested the officer did not have any reasonable or any trustworthy information sufficient to warrant a prudent man in believing she was committing an offense, and that removal of the evidence was threatened.

### III

THE COURT ERRED IN HOLDING THAT THE GOVERNMENT DID NOT HAVE TO DISCLOSE THE NAME OF THE INFORMANT WITHOUT COLLATERALLY DISMISSING THE CASE AND DISCHARGING APPELLANT.

The refusal of the government to disclose the informer's identity in the light of the thinness

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the entrance of the building. The air was thick with the scent of old wood and the faint, distant smell of coffee. I had heard that the office was old, but I didn't realize how old. The walls were covered in a dark, polished wood that had been here for decades. The floor was made of the same material, and it felt like I was walking on a piece of history. I took a deep breath and tried to ignore the cold. I was here for a reason, and I was going to make the most of it. I walked down a long, narrow hallway that seemed to go on forever. The walls were lined with doors, each with a small, brass handle. I noticed that some of the doors were slightly ajar, and I could hear faint voices coming from inside. I felt a little nervous, but I pushed the feeling aside. I was here for a reason, and I was going to make the most of it. I reached the end of the hallway and found a large, open office. The room was filled with bookshelves that reached up to the ceiling. The shelves were filled with books of all sizes, colors, and thicknesses. I walked over to a desk and found a small, round clock. The clock was made of wood and had a simple, elegant design. I looked at the clock and noticed that the time was 10:10. I had just arrived at the office, and it was already 10:10. I felt a little strange, but I didn't say anything. I was here for a reason, and I was going to make the most of it. I walked over to a desk and found a small, round clock. The clock was made of wood and had a simple, elegant design. I looked at the clock and noticed that the time was 10:10. I had just arrived at the office, and it was already 10:10. I felt a little strange, but I didn't say anything. I was here for a reason, and I was going to make the most of it.

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of the government's case requires a reversal.

Secrecy cannot be maintained where disclosure is necessary to a fair trial.

Roviaro v. United States, 353 US 53,

1 L.ed.2d 659

In the Roviaro case, the court said:

"Where the disclosure of an informant's identity or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way."

In Roviaro, as here, the petitioner was charged with a narcotic violation. In the Roviaro case it was the sale. An unidentified informant was supposed to have given the information. The testimony of the narcotics agents and police officers, who by prearrangement with the unnamed informer followed petitioner and the informer and observed the transaction, while seemingly conclusive of guilt, brought about a reversal of the conviction for refusal to compel disclosure of the informer's name and address.

The identity of the informer as reliable in this case likewise became important. The right of

The first of these is the fact that the  
author has not been able to find any

other examples of this kind of

writing in the history of the

language.

It is true that there are many  
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the defendant to produce evidence which would show that the informer was not reliable and that the officers did not have any basis for their search from a reliable informer is certainly a necessary part of the defense in this case and deprived the defendant of fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

Brady v. Maryland, 373 US 82, 10 L.ed.2d

215

The search cannot be justified by what is turned up at the search.

Silverthorne Lumber Co. v. United States,

251 US 385, 64 L.ed. 319

In Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, an informer told the police that the defendant had narcotics. The officers went to the apartment and arrested the man, without a warrant, and searched the apartment, finding drugs. The court there said:

"If testimony of communications from a confidential informer is necessary to establish the legality of the search, the defendant must be given a fair opportunity to





rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's acts depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

(50 Cal.2d at 818)

It is therefore apparent that:

(1) There was no waiver on the part of the defendant to a search and to a seizure, both being



separate elements requiring consents.

Boyd v. United States, 116 US 616, 29 L.  
ed. 746

Takahashi v. United States, 143 F.2d 118

(2) There was no reasonable or probable cause to believe that this defendant was committing a felony or that she had any guilty knowledge of the contents of the bags at the time of her arrest.

(3) Both the search and the seizure were conducted without a warrant and without probable cause subsequent to the arrest.

(4) Defendant was deprived of an opportunity to determine probable cause from the refusal of the government to reveal the identity of the informer and, having elected to refuse to identify the informer, the defendant is entitled to a dismissal.

United States v. Coplon, 191 F.2d 749

### CONCLUSION

WHEREFORE, defendant prays that the judgment be reversed and that the evidence be ordered suppressed as to her and that the indictment be ordered dismissed as to her in the light of the unlawful search and seizure and in the light of the election





of the government not to reveal the name of the  
informer.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant  
Ramona Cipres



CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Morris Lavine  
Attorney for Appellant

# MEMORANDUM

TO : THE PRESIDENT

FROM : THE SECRETARY OF DEFENSE

SUBJECT: [Illegible]

[Illegible]







FOR THE NINTH CIRCUIT

---

RAMONA CIPRES and JUAN MONTES DeOCA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

[Mar. 18, 1965]

Appeal from the United States District Court  
for the Southern District of California  
Central Division

---

Before: HAMLEY, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

Ramona Cipres and Juan Montes DeOca appeal from convictions for trafficking in marihuana contrary to 21 U.S.C.A. § 176(a).

I

Appellants argue that the district court erred in admitting into evidence two suitcases containing marihuana, contending that the evidence was secured by conduct violating Cipres' Fourth Amendment right to freedom from unreasonable search and seizure.

The marihuana was discovered and seized at the

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Los Angeles International Airport by a Customs agent and an officer of the Los Angeles Police Department. Their testimony relevant to the search and seizure was as follows: In September 1963, a man known to be engaged in narcotics traffic between Los Angeles and New York City checked in at a Los Angeles hotel under the assumed name of "Martinez." The airline companies were asked to advise the authorities of any reservations made in that name. On September 17, American Airlines informed the Customs Service that such a reservation had been made for an evening flight to New York City. The Customs agent and the police officer stationed themselves near American Airlines' check-in counter. Shortly before the scheduled departure time of the flight a car drove up to the adjacent curb and both appellants alighted. The Customs agent recognized DeOca as a person he had investigated earlier for possible involvement in narcotics traffic. DeOca took two suitcases from the car trunk, set them on the curb, returned to the car, and drove off. A porter took the bags to the check-in counter and set them on the scale. Cipres followed. The Customs agent observed that the bags weighed 140 pounds, and heard Cipres ask for a

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reservation in the name "Martinez." The officers identified themselves to Cipres, told her they were conducting a narcotics investigation, and wished to talk with her. In response to their questions, she told them her name was Cipres, but that she sometimes used the name Martinez in traveling. She said the bags contained clothing, but added, in explanation of their weight, that they also contained cosmetics. The officers told Cipres they suspected the bags contained marihuana. She denied it. They asked if they could search the bags. She answered, "Yes, I have nothing to hide," but added that she had left the keys in New York City. They examined the bags and found them unlocked. The Customs agent opened the bags, discovered the marihuana, and arrested Cipres.

Cipres denied consenting to the search. She testified that the officers accosted her and asked about the contents of the bags. She asked if they had a search warrant, but they simply proceeded to open the bags. The officers admitted that Cipres asked if they had a search warrant, but only after the Customs agent had opened the bags with her permission and discovered the marihuana.

The District court treated the issue as simply



whether or not Cipres told the officers they might search the suitcase. Seeing "no reason why I should disbelieve the testimony of the two officers," the court admitted the evidence.

But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the persons known may be freely and effectively withheld.<sup>1</sup> We recently sustained a district court finding that such waiver was lacking despite an express verbal consent,<sup>2</sup>

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1. See generally, Comment, 113 U. Pa. L. Rev. 260 (1964)

2. Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964), affirming Application of Tomich, 221 F.Supp. 500 (D. Mont. 1963).





and such cases are common.<sup>3</sup> They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.<sup>4</sup>

Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her assent may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it

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3. See, e.g., *United States v. Marrese*, 336 F.2d 501, 504 (3d Cir. 1964); *Pekar v. United States*, 315 F.2d 319, 324-25 (5th Cir. 1963); *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962); *Channel v. United States*, 285 F.2d 217, 219 (9th Cir. 1960); *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954); *Nelson v. United States*, 208 F.2d 505, 513 (D.C. Cir. 1953); *Catalanotte v. United States*, 208 F.2d 264, 268 (6th Cir. 1953); *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951). See also *Greenwell v. United States*, 336 F.2d 962, 967-68 (D.C. Cir. 1964).

4. Manwaring, 16 *Stan. L. Rev.* 318, 334-35 (1964).





was obtained "under color of the badge" and therefore presumptively coerced;<sup>5</sup> it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual;<sup>6</sup> it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened;<sup>7</sup> and admittedly Cipres asked if the officers had a search warrant.

Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present

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5. United States v. Page, 302 F.2d 81, 84 (9th Cir. 1962).

6. Application of Tomich, supra, note 1, 221 F. Supp. at 503.

7. Channel v. United States, 284 F.2d 217, 221 (9th Cir. 1960); Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). See also United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962). But see Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964), vacated and remanded \_\_\_\_ U.S. \_\_\_\_ March 15, 1965).



record or after such further hearing as the court may deem appropriate.<sup>8</sup>

As we have noted, Cipres was arrested immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure.<sup>9</sup>

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8. See *Martinez v. United States*, \_\_\_ U.S. \_\_\_ (March 15, 1965); *Rios v. United States*, 364 U.S. 253, 260-62 (1960); *Masiello v. United States*, 304 F.2d 399, 401 (D.C. Cir. 1962); *United States v. Page*, 302 F.2d 81, 86 (9th Cir. 1962).

9. *Dickey v. United States*, 332 F.2d 773, 778 (9th Cir. 1964); *Fernandez v. United States*, 321 F.2d 283, 286-87 (9th Cir. 1963); *Busby v. United States*, 296 F.2d 328, 332 (9th Cir. 1961). See also *United States v. Haley*, 321 F.2d 956, 958 (6th Cir. 1963). Compare *Mosco v. United States*, 301 F.2d 180, 187-88 (9th Cir. 1962); Shadoan, *Law and Tactics in Federal Criminal Cases* 67 (1964); Collins, 50 Cal. L. Rev. 421, 441-42 (1962); Manwaring, 16 Stan. L. Rev. 318, 344-46 (1964); Orfield, 24 La. L. Rev. 665, 681, 82 (1964). The Supreme Court has reserved the question. *Ker v. California*, 374 U.S. 23, 42-43 (1963). See also *Stoner v. California*, 376 U.S. 483 (1964).

It has been suggested that since the rule has been applied only where there were reasonable grounds to believe that imminent destruction or removal of material subject to seizure was threatened (prior to





Thus the inquiry would be whether at the moment the bags were searched <sup>10</sup> the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, <sup>11</sup> and that removal of the evidence was threatened. <sup>12</sup> But these also are questions of fact to be decided initially by the district

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the searches in Busby and Haley the officers saw, and in Fernandez smelled, probable contraband in temporarily stopped automobiles, in Dickey, a probable possessor of narcotics was moving toward a bathroom), and hence is merely an application of the accepted principle that the Fourth Amendment does not preclude a search without a warrant in such "exigent circumstances" exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (United States v. Ventresca, \_\_\_ U.S. \_\_\_ n. 2 (March 1, 1965); United States v. Jeffers, 342 U.S. 48, 51 (1951); Johnson v. United States, 333 U.S. 10, 14 (1948)), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal or destruction.

10. Of course, nothing disclosed by the search could be considered to justify the arrest. United States v. Di Re, 332 U.S. 581, 595 (1948).

11. This accepted definition or probable cause for arrest was most recently restated by the Supreme Court in Beck v. Ohio, 379 U.S. 89, 91 (1964). The "reasonable grounds" to believe that an offense is being committed, authorizing a Customs agent to make an arrest without a warrant under 26 U.S.C.A. §7607 (2) is the equivalent of Fourth Amendment "probable cause." Wong Sun v. United States, 371 U.S. 471, 478 n. 6 (1963).



court. That court has not yet done so; having found that Cipres "consented" to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U.S.C.A. §482.<sup>13</sup> To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand.

## II

The appellant's remaining specifications of error are insubstantial.

1. It is true, of course, that proof of mere proximity to the drug would be insufficient to establish actual or constructive "possession" within the meaning of 21 U.S.C.A. §176(a).<sup>14</sup> However, the testimony regarding Cipres' responses to the officers' inquiries as to contents of the bags, plus the

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12. In addition to other facts recited earlier, it appeared that one of the bags had been placed on the airline conveyor belt.

13. See *Romero v. United States*, 318 F.2d 530 (5th Cir. 1963).

14. *Arellanes v. United States*, 302 F.2d 603, 606 (9th Cir. 1962).





natural inferences from the evidence as to the placement and movements of Cipres and the suitcases, afforded an adequate basis for the jury's determination that the luggage was in Cipres' immediate physical custody or subject to her dominion and control. Indeed, she testified to as much at the trial, offering an innocent explanation of a possession she did not deny.

2. No argument was offered in support of Cipres' specification of error asserting an insufficiency of proof of knowledge that the bags contained marijuana. Nonetheless, we have satisfied ourselves that the jury could properly infer guilty knowledge from evidence of record which, in the circumstances, we will not pause to detail.

3. Read in context, the trial court's comments upon the evidence, which Cipres suggests were inaccurate, were of minor importance. The court carefully instructed the jury that it was the sole judge of the facts and that the court's comments might be disregarded. No exception was taken at trial to the portions of the charge which Cipres now attacks.

"We can find no plain error therein affecting the substantial rights of the appellants, nor can we





find any error which would result in a manifest miscarriage of justice." Gilbert v. United States, 307 F.2d 322, 327 (9th Cir. 1962).

4. We find no plain error in government counsel's closing argument.

5. Finally, appellant De Oca's argument that evidence concerning a second seizure of marihuana should have been suppressed as the product of the assertedly illegal prior seizure discussed above cannot be sustained. There is nothing in the record to indicate that the two seizures were related.<sup>15</sup> Appellant DeOca made no suggestion in the trial court that the evidence be suppressed or excluded as tainted by the earlier seizure, or for any other reason.<sup>16</sup>

Remanded for further proceedings in accordance with this opinion.<sup>17</sup>

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15. Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962); Lowery v. United States, 258 F.2d 194, 196 (9th Cir. 1958).

16. Westover v. United States, \_\_\_ F.2d \_\_\_ (9th Cir. 1965); Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961); compare Henry v. Mississippi, \_\_\_ U.S. \_\_\_ (1965).

17. Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).



N O. 2 0 2 3 5

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APPELLEE'S BRIEF

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APPEAL FROM  
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CENTRAL DIVISION

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MANUEL L. REAL,  
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**FILED**

DEC 1 1965

FRANK H. SCHMID, CLERK





N O. 2 0 2 3 5

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RAMONA CIPRES, JUAN MONTES DeOCA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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I

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION.

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On October 16, 1963, the Federal Grand Jury for the Southern District of California, Central Division, returned a two-count Indictment charging appellants as follows:

Count One: Both appellants Ramona Cipres and Juan Montes DeOca together with Manuel Angel Gonzalez were charged with the September 17, 1963 receipt, concealment and facilitation of the transportation of 48,229 grams of marihuana within the Central Division of the Southern District of California, in violation of Title 21, United States Code, Section 176(a).

Count Two: Appellant DeOca and Gonzalez were charged



with the September 18, 1963 receipt, concealment and facilitation of transportation of 70,726 grams of marihuana within the Central Division of the Southern District of California, in violation of Title 21, United States Code, Section 176(a) [C. T. 2, 3]. <sup>1/</sup>

On October 28, 1963, the appellants were arraigned on the Indictment and pleaded not guilty as charged [C. T. 5].

Manuel Angel Gonzalez, also charged in the Indictment in both counts, entered a plea of guilty to Count One of the Indictment on December 10, 1963, prior to the commencement of trial [C. T. 25-27]. He did not go to trial.

On December 10, 1963, jury trial was commenced before United States District Judge Harry C. Westover [R. T. 4]<sup>2/</sup>; and on December 13, 1963, the jury returned verdicts of guilty as to appellant DeOca on Counts One and Two, and as to appellant Cipres on Count One [C. T. 21].

On January 7, 1964, appellant DeOca was sentenced to five years imprisonment on Counts One and Two, to run concurrently, and appellant Cipres was sentenced to five years imprisonment on Count One [C. T. 43, 1a].

Timely notices of appeal were filed by appellant Cipres on January 7, 1964 [C. T. 2a], and by appellant DeOca on January 10, 1964 [C. T. 44].

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<sup>1/</sup> C. T. refers to Clerk's Transcript of Trial Proceedings.

<sup>2/</sup> R. T. refers to Reporter's Transcript of Trial Proceedings.





On March 18, 1965, this Court filed its Opinion in case No. 19217, 343 F.2d 95 (9th Cir. 1965), remanding the case to the District Court for further proceedings, which Opinion is attached hereto and marked Appendix "A".

Thereafter, on May 18, 1965, further proceedings were held before United States District Judge Harry Westover [R. T., May 18, 1965 Hearing, pp. 1-103]. Special Findings of Fact and Conclusions of Law were filed on June 8, 1965, sustaining the judgment of conviction, and are set out in toto within this brief.

Thereafter timely notice of appeal was filed by DeOca on June 17, 1965, and by appellant Cipres on June 18, 1965.

The United States District Court for the Southern District of California had jurisdiction of this case based on Title 21, United States Code, Section 176(a), and Title 18, United States Code, Section 3231. The jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTES INVOLVED

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Title 21, United States Code, Section 176(a), provides in pertinent part as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation,



concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 19, United States Code, Section 482, reads as follows:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable



cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast or otherwise, he shall seize and secure the same for trial. "

### III

#### STATEMENT OF THE CASE

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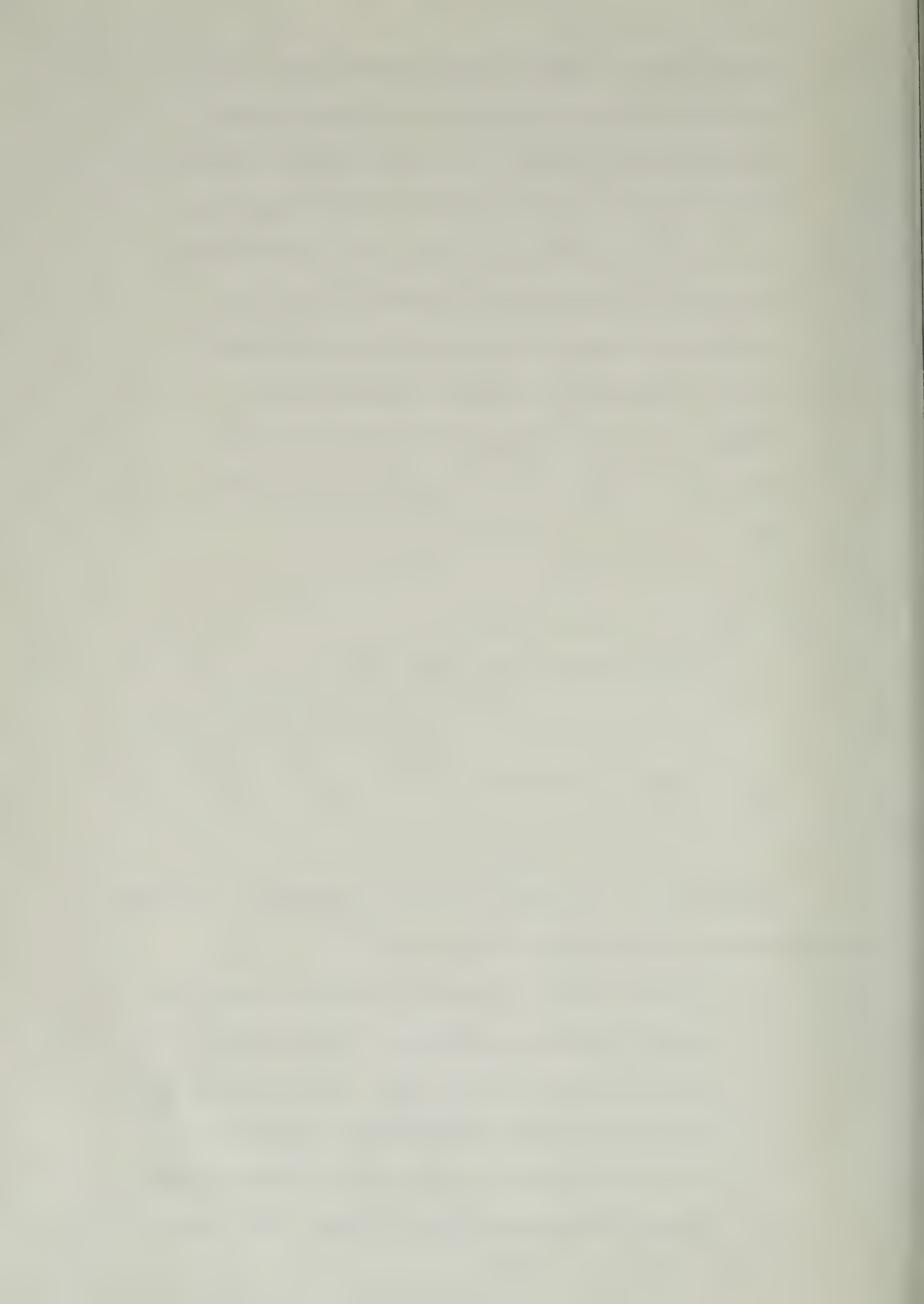
##### A. Questions Presented.

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The following questions have been presented by appellants on these appeals and are here paraphrased:

- 1) Was the search of appellant Cipres' bags at the airport valid as incident to a substantially contemporaneous lawful arrest, based on reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that appellant Cipres was committing an offense, that removal





of the evidence was threatened, and that an immediate search was necessary to preserve the material subject to seizure?

- 2) Was the marihuana (Exhibit No. 5) found in the garage of Manuel Gonzalez, and the subject of Count Two, a product of an illegal search and seizure, i. e. the fruit of the poisoned tree?
- 3) Did the District Court err in refusing to force the Government to disclose the identity of a confidential reliable informant, who had related to an agent that one Jorge Rodriguez was to receive marihuana in Los Angeles in September of 1963 which was to be brought across the border by Miguel Garcia and Cerena Truba.

## B. Statement of Facts

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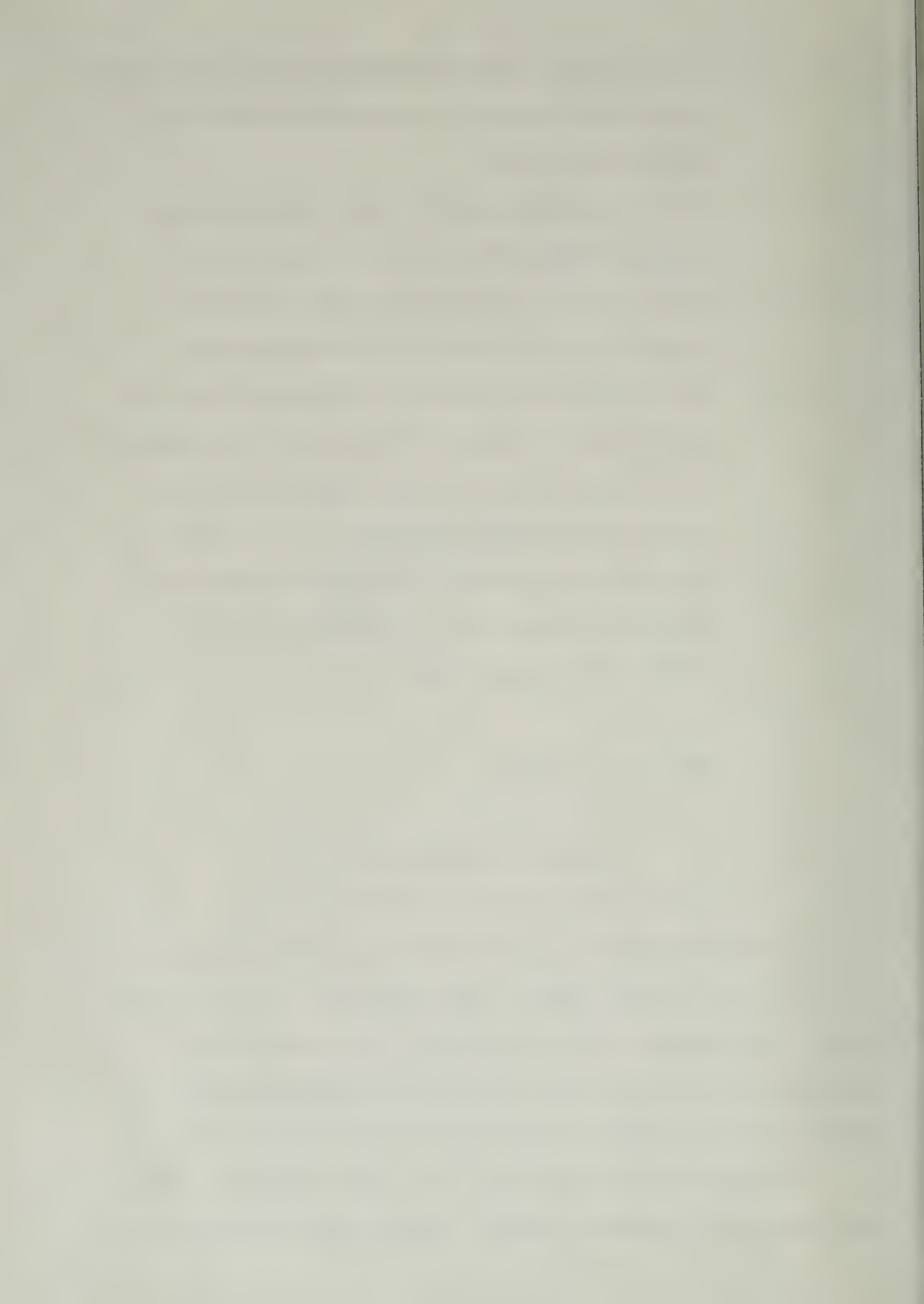
### 1. Evidence at Jury Trial

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The following facts were adduced at appellants' jury trial:

In August of 1962, Manuel Angel Gonzalez, a Cuban citizen living in Los Angeles, met Oscar DeOca. Two months later Gonzalez met Oscar's brother, appellant Juan Montes DeOca. Gonzalez later got appellant DeOca a job [R.T. 20, 21, 22].

Approximately three weeks prior to September 17, 1963, Gonzalez met with appellant DeOca. DeOca explained that he and



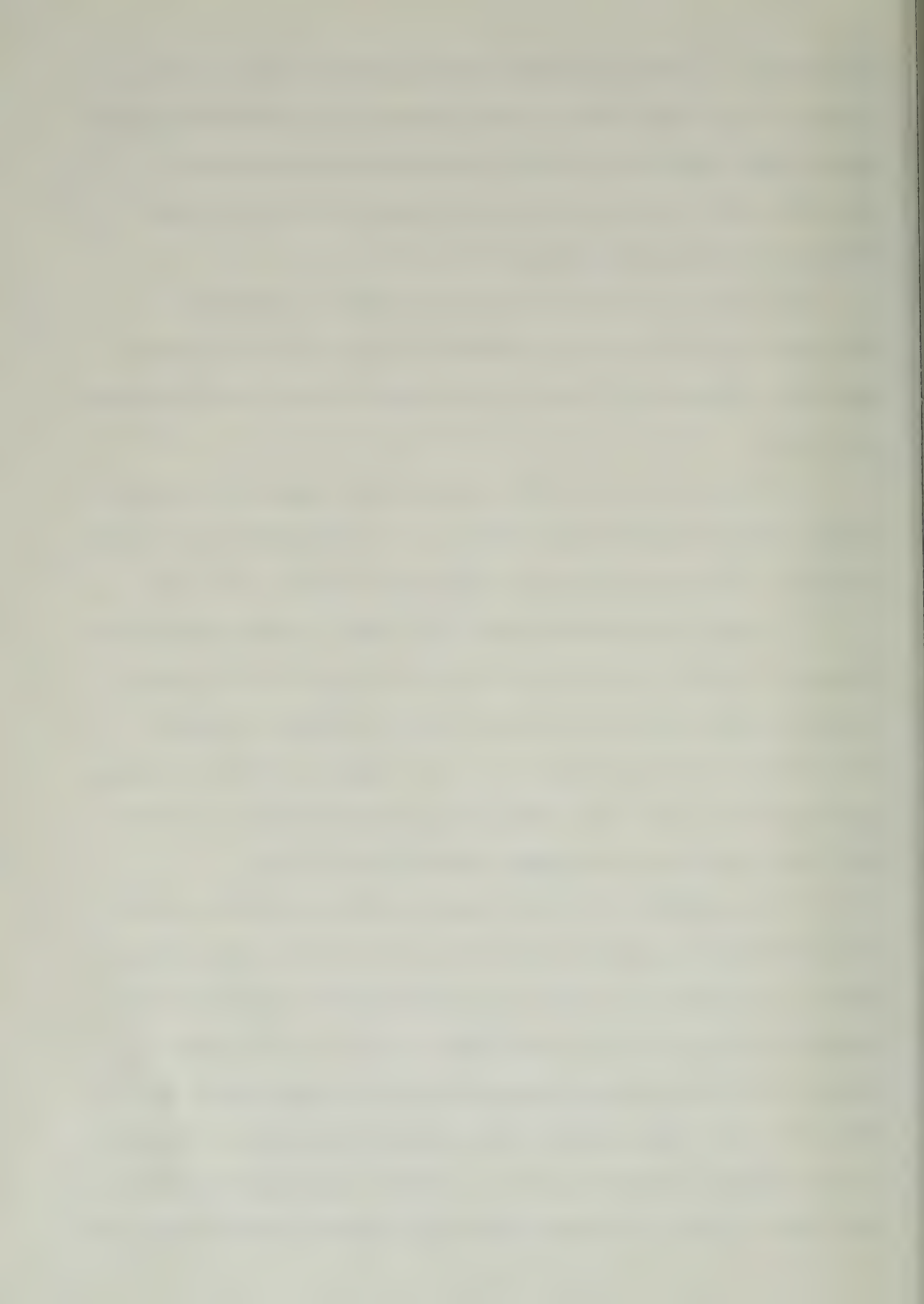
his wife were getting separated and requested permission of Gonzalez to leave some luggage in the garage for the period of approximately four days [R. T. 23, 27]. Gonzalez acquiesced and thereafter four suitcases were left by appellant DeOca and his brother in the Gonzalez garage [R. T. 27].

On September 8, 1963, appellant DeOca returned to Gonzalez' home and in a conversation concerning the suitcases, admitted to Gonzalez, "Yes, its marihuana. I am in that business." [R. T. 41].

On September 11, 1963, Gonzalez gave appellant's brother (Oscar DeOca) duplicate keys to his car, a 1959 pink 4-door Pontiac Catalina, keeping one set of keys for himself [R. T. 133, 36].

On the evening of September 11, 1963, Gonzalez placed two pieces of luggage in the trunk of his car and drove to the airport. After parking, he proceeded to an airport cafeteria. When he later returned to the parking lot, he saw appellant DeOca crossing the street [R. T. 62, 63]. When Gonzalez opened the trunk of the car, six days later, the luggage was gone [R. T. 66].

On September 17, 1963, appellant DeOca and his brother Oscar brought a cardboard carton [Ex. 5] to the Gonzalez garage [R. T. 72]. Later in the day, appellant's brother returned to the garage with two empty blue bags [Exs. 1 and 2], and filled the bags from the marihuana contained in the cardboard carton [R. T. 65, 117, 118]. The bags were then placed in the trunk of Gonzalez' car by appellant DeOca's brother, and the trunk was locked [R. T. 70]. Subsequently, Gonzalez was asked by Oscar DeOca to take the



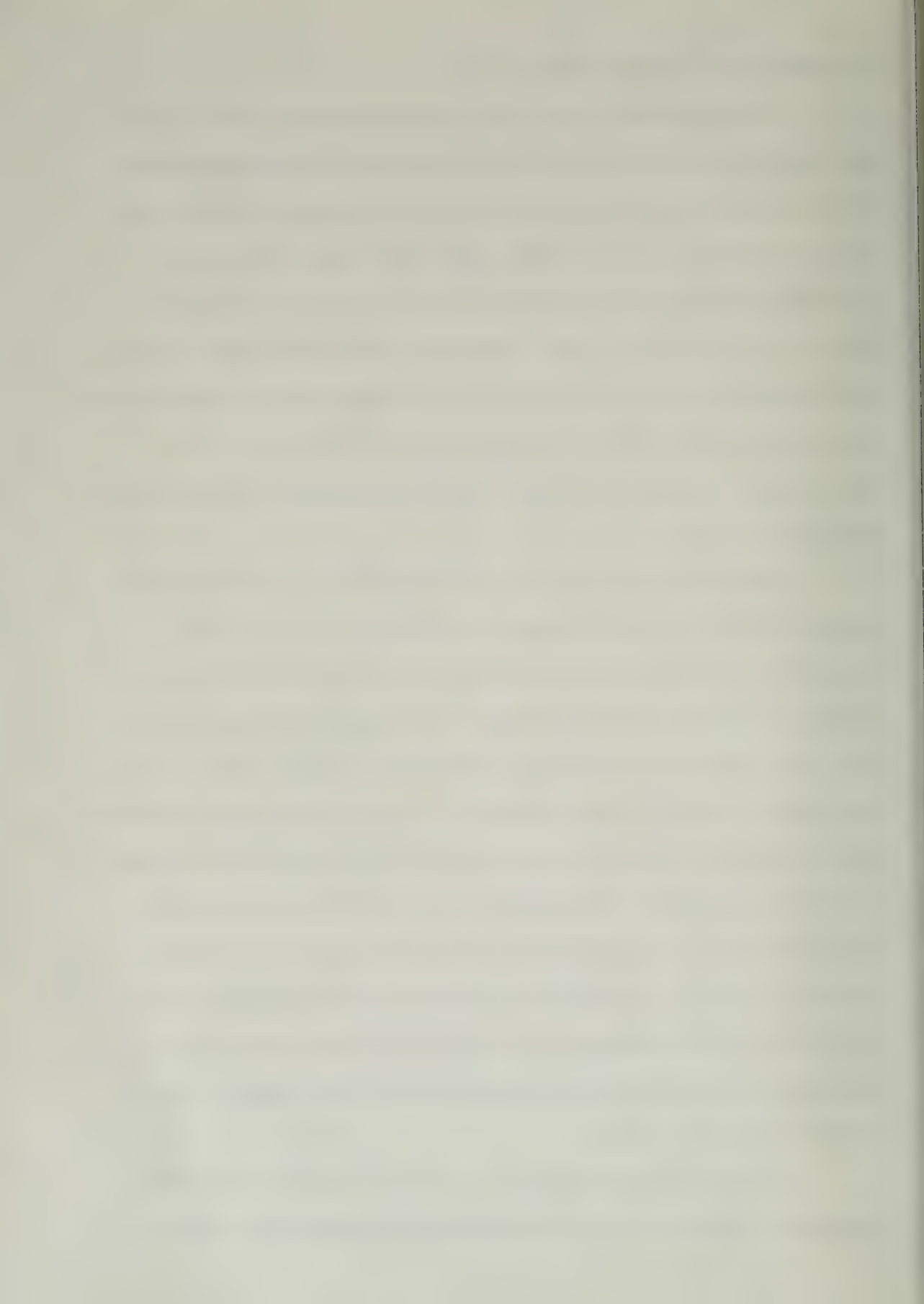


suitcases to the airport [R. T. 118].

At approximately 8:15 p.m., September 17th [R. T. 131], and before he could drive his car to the airport, Gonzalez drove to his mother's house where he was met by appellant DeOca, who was waiting for him [R. T. 123]. Appellant DeOca then took Gonzalez' car and stated he would return the car in an hour and half or two hours [R. T. 125]. Appellant DeOca drove off, despite the fact that Gonzalez noted that he had retained his own set of keys in his pocket [R. T. 124]. At approximately 10:45 p.m., that same night, Gonzalez found the car in a lot adjacent to his mother's home [R. T. 131].

Meanwhile, at 9:00 p.m. on September 17, 1963, Customs Agent Neil Greppin and Sergeant D. W. Beckman of the Los Angeles Police Department, had stationed themselves near the American Airlines ticket counter at Los Angeles International Airport, as a result of information received to the effect that a man utilizing the name of Julian Martinez, a Cuban marihuana trafficker [R. T. 153], had checked in at the Blair House Hotel in Hollywood and was suspected of involvement in the trafficking of narcotics from New York to Los Angeles, and Los Angeles to New York [R. T. 153, 196]. A check had been made with the airlines and it was discovered that American Airlines had a reservation on a flight leaving at 10:00 p.m., on September 17th, under the name of Martinez [R. T. 153].

At approximately 9:50 p.m., at the previously described location, Greppin saw appellants DeOca and Cipres get out of a

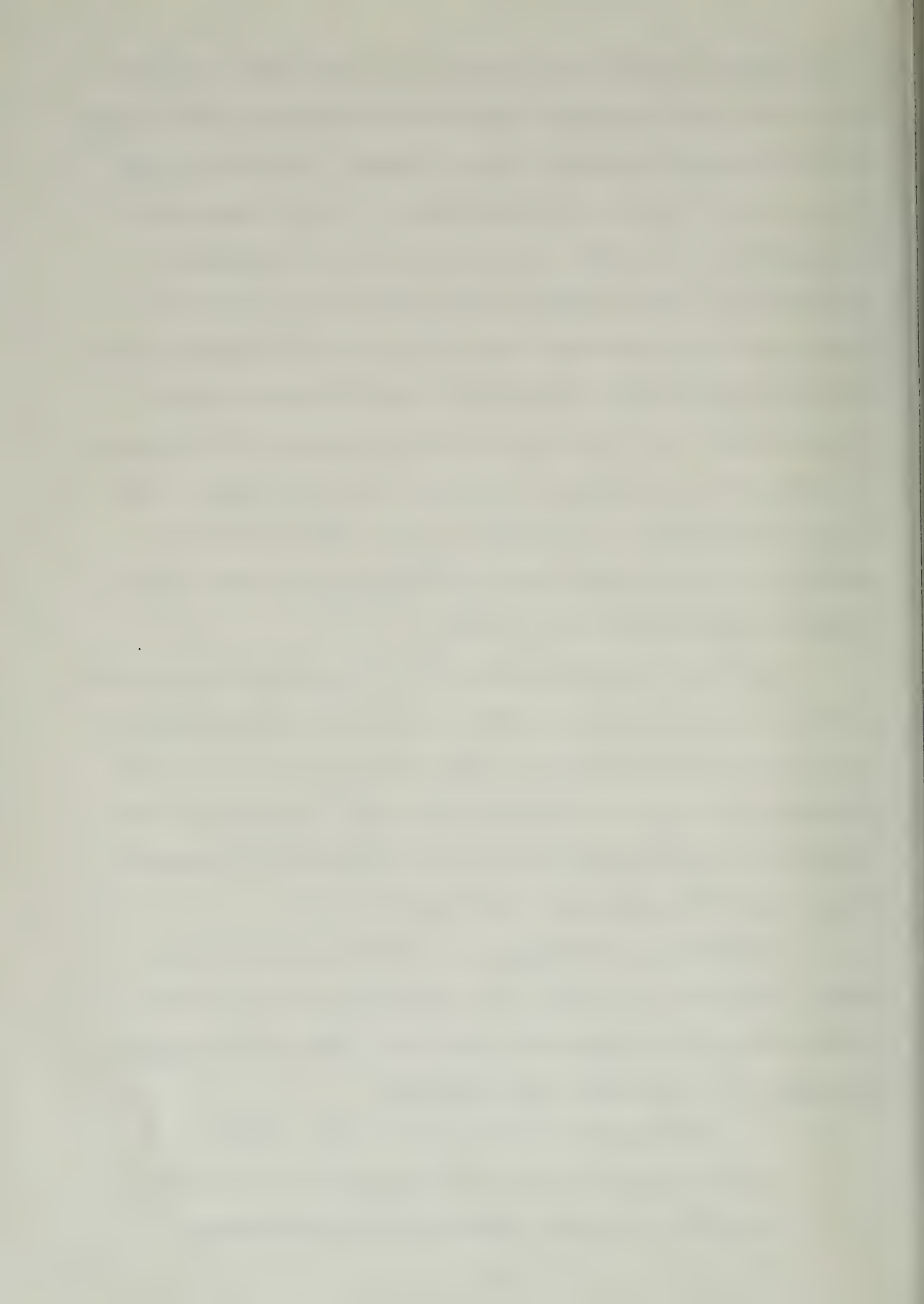


1959 salmon colored Pontiac, California license LMC 357 [R. T. 135, 138], a car registered to Manuel Gonzalez [R. T. 179a]. The officers watched as appellant DeOca removed two suitcases from the car [Exs. 1 and 2], and handed them to a porter stationed at curbside [R. T. 137-139]. Appellant DeOca was recognized immediately by Agent Greppin as the subject of previous surveillances relative to narcotics trafficking [C. T. 37]. Sergeant Beckman testified that prior to the officer's arrival at the airport, "a previously reliable informant of the Los Angeles Police Department had informed the Department that Juan Montes DeOca was 'running' marihuana for his brother, Oscar DeOca" [C. T. 40]. DeOca was then observed to get back into the Pontiac and drive away from the terminal [R. T. 140].

Appellant Cipres was observed to follow the porter with the suitcases to the American Airlines counter. As Cipres called for a reservation under the name of Martinez [C. T. 38; R. T. 140], Beckman and Greppin observed that the bags, when placed on the weighing machine at the ticket counter by the porter, weighed approximately 140 pounds [R. T. 140, 162].

Both Greppin and Beckman, in affidavits filed with the court, stated that based upon prior investigations in marihuana traffic between Los Angeles and New York, they knew the modus operandi of the traffickers was as follows:

"Young Latin female couriers checked overweight baggage containing marihuana into the counters at American and Trans World Airlines immediately



prior to flight time. Additionally the flights were invariably nonstop flights from Los Angeles to New York City." [C. T. 38, 41].

The officers then approached appellant Cipres, identified themselves as police officers and stated that they were conducting a narcotic investigation concerning her [R. T. 142, 165]. When asked for identification, appellant Cipres admitted that her real name was Ramona Cipres, but indicated that she sometimes used the name Martinez when travelling [R. T. 144].

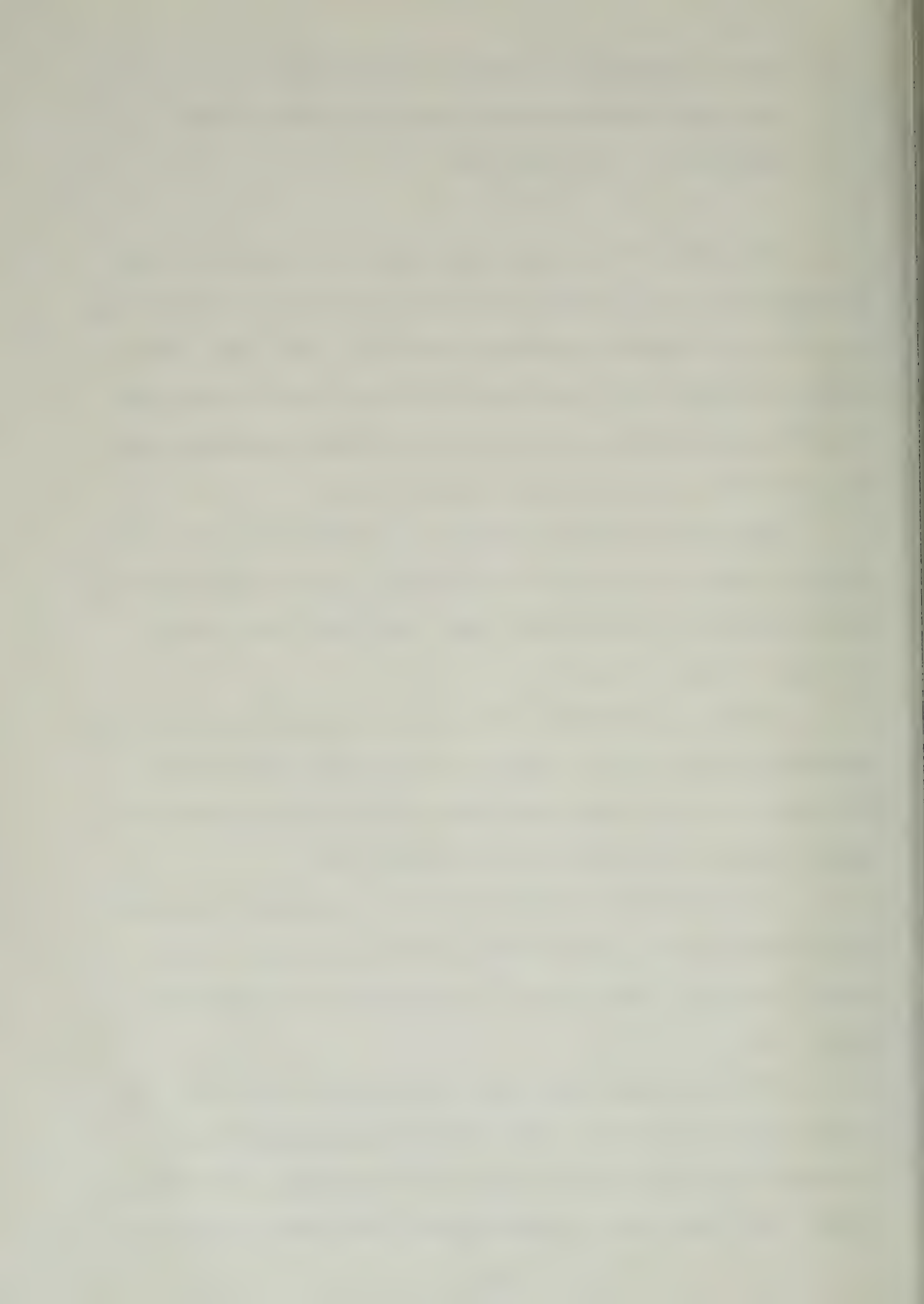
Beckman then asked her if she would step away from the counter "where I could talk to her further concerning the suitcases which I believe to contain marihuana. She came along with me willingly." [R. T. 165].

Beckman picked one of the heaviest suitcases off the scales and walked away from the counter with appellant Cipres while Greppin pulled the second bag off the airline conveyor belt, left it at the counter, and joined the others [R. T. 144].

Appellant Cipres during this initial conversation, indicated that she had stayed at Monte Villa, and had just come from a friend's home in a cab in order to catch a plane for New York [R. T. 166].

When first asked about the contents of her suitcase, she claimed she had clothes in them, but when queried as to how clothing could give so much weight to the suitcases, admitted, "Well, I don't only have clothes in there, but I have cosmetics in





there as well" [R. T. 166].

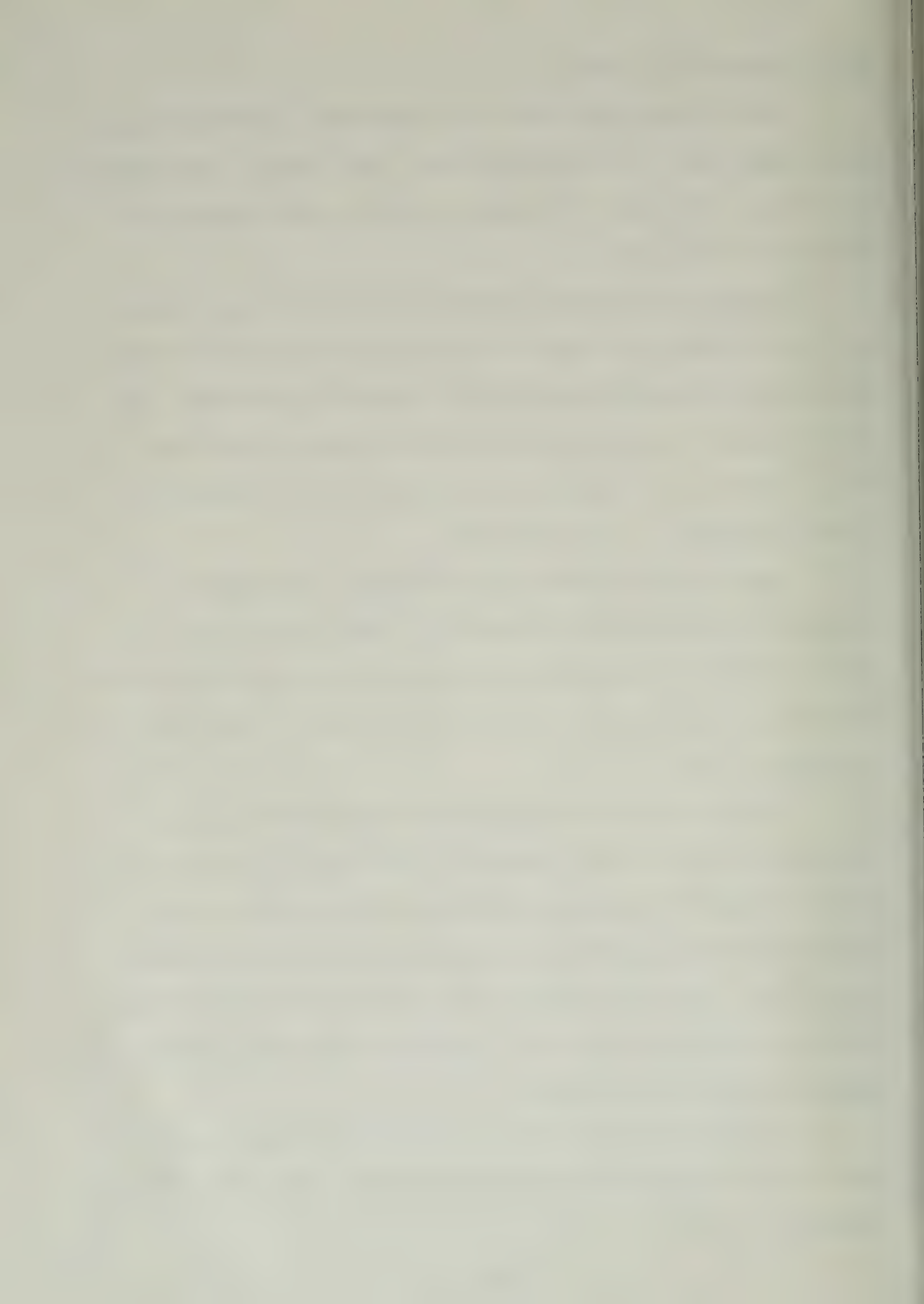
Asked if they could search her suitcases, appellant Cipres responded, "Yes, I have nothing to hide" [R. T. 166]. When asked for the keys she added, "The bags are locked and the keys are in New York " [R. T. 145].

At this point Greppin returned to the second bag, picked it up, and by pushing the sides in and placing his nose to the seam of the suitcase, he smelled an odor familiar which was to him, that of marihuana. He thereupon opened the suitcases, which were found to be already unlocked and discovered the marihuana contained therein [R. T. 147, 162, 184].

Agent Greppin walked over to Beckman and appellant Cipres and advised appellant Cipres she was under arrest. The other bag [Ex. 2] was subsequently opened at the airport and found to contain marihuana [R. T. 186]. Neither bag was found to be locked [R. T. 162].

After the trial had commenced and during the course of Agent Greppin's testimony, appellants challenged the admissibility of the suitcases containing the marihuana [Exs. 1 and 2] on the grounds that they constituted the fruits of an unreasonable search [R. T. 149]. The trial court then took evidence outside the presence of the jury relating to the search which occurred at the airport where appellant Cipres was arrested.

The court found that the search in question was made with the voluntary consent of appellant Cipres [R. T. 172] and denied the motion [R. T. 176].



The jury trial resumed and the suitcase [Ex. 1] was admitted into evidence [R. T. 185].

Later in the trial the motion for suppression was renewed [R. T. 392] by appellant Cipres and the court again denied the motion, stating:

"I think counsel, that whether or not consent was given was a question of fact. I have ruled against you. I have said if permission was given, and permission was given, why that rules out the question of illegal search and seizure." [R. T. 532].

Because of the Court's decision that consent had been given to the search, no ruling was made by the District Court as to whether or not the officers had probable cause to seize and search the bags and/or arrest appellant Cipres.

## 2.        Decision of the Court of Appeals

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The March 18, 1965 decision of the Court of Appeals, reported as Ramona Cipres and Juan Montes DeOca v. United States of America, 343 F.2d 95 (9th Cir. 1965), remanded the case "for further proceedings in accordance with this opinion". (The entire opinion is set out herein and attached hereto as Appendix "A".)

Of pertinence is the following language found at pages 98 and 99 in that opinion:





"Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her arrest may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it was obtained "under color of the badge" and therefore presumptively coerced; it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual; it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened; and admittedly Cipres asked if the officers had a search warrant.

"Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present record or after such further hearing as the court may deem appropriate.

"As we have noted, Cipres was arrested



immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure. Thus the inquiry would be whether at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, and that removal of the evidence was threatened. But these also are questions of fact to be decided initially by the district court. That court has not yet done so; having found that Cipres 'consented' to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U. S. C. A. §482. To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand."



3. The Hearing and Findings of the District Court on Remand.

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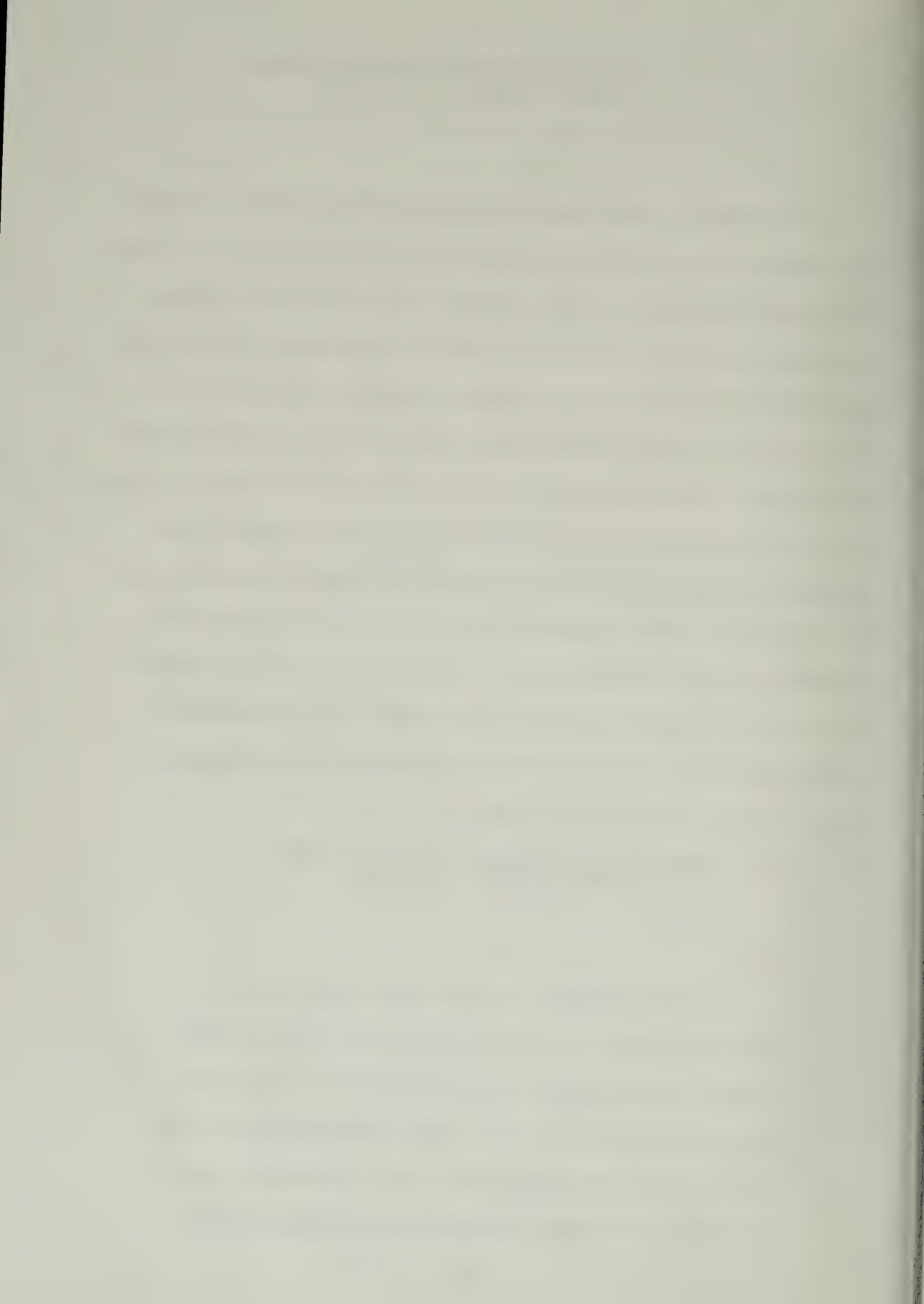
On May 18, 1965, the United States District Court heard the matter on remand and took additional testimony, and on June 8, 1965 entered Special Findings of Fact and Conclusions of Law. In the hearing before the District Court, appellee did not present any additional evidence as to whether appellant Cipres had been warned of her constitutional immunity from unreasonable search and seizure. Appellee agreed with the District Court that, in light of all of the facts and the previous opinion of this Court, that appellant Cipres had not intentionally relinquished a known right and privilege. Hence the only remaining issue in question was whether or not the officers made a search which was justifiable as incident to a lawful arrest or as incident to a substantially contemporaneous arrest. At the conclusion of the hearing the District Court made the following:

"SPECIAL FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

I

"The above-entitled matter came on for hearing on May 18, 1965 on the basis of the opinion of the United States Court of Appeals for the Ninth Circuit, dated March 18, 1965, remanding the same for further proceedings before the Honorable Harry C. Westover, Judge, United States District Court;





the plaintiff appearing by John K. Van de Kamp, Assistant United States Attorney, Chief of the Criminal Division; defendant Ramona Cipres appearing and represented by counsel Harold J. Ackerman; defendant Juan Montes DeOca appearing and represented by counsel Wm. Bryan Osborne;

"The Court having considered the opinion of the Ninth Circuit Court of Appeals, the reporter's and clerk's transcript of the trial, and the records, file, and papers in the above matter, and having considered the testimony of the witness, Neil E. Greppin, at the hearing on May 18, 1965, together with the argument of counsel, the Court now makes its findings of fact.

"1. Since the latter part of 1962, Customs Agents in New York and Los Angeles investigated the shipment of marihuana from Los Angeles Airport to New York City." [May 18, 1965 Hearing, R. T. 7].

"2. As a result of the arrest of Frederick Penney in New York City in November of 1962, culminating an investigation relating to the shipment of marihuana from Los Angeles to New York, evidence was discovered by Customs Agents showing telephone calls in October 1962 and January 1963 from Penney's number to the number listed to Oscar De Oca (the defendant's brother) in Los Angeles." [May 18, 1965



Hearing, R. T. 8, 39].

"3. Subsequently, Customs Agents placed defendant De Oca and Oscar De Oca under surveillance." [May 18, 1965 Hearing, R. T. 9].

"4. In May of 1963, Customs Agents arrested a person by the name of Gomez coming across the Mexican border with 250 pounds of marihuana. Gomez stated to Customs Agents that his own vehicle had been left at the house of the person to whom the marihuana was going. Soon thereafter, Gomez' vehicle was located near the front of De Oca's home, was impounded thirty days later by Customs Agent Greppin and Sergeant Beckman of Los Angeles Police Department, and was found to contain a large quantity of marihuana debris." [May 18, 1965 Hearing, R. T. 10, 11].

"5. In September of 1963, the State Bureau of Narcotics relayed to Customs Agents information that they had received from a previously reliable informant, Roy Manzaneres, to the effect that defendant De Oca and Oscar De Oca were to receive a shipment of approximately 1000 pounds of marihuana from Mexicali. Customs Agents were also told that on one occasion Manzaneres had reported seeing defendant De Oca and brother Oscar De Oca receive 250 pounds of marihuana." [May 18, 1965 Hearing,





R. T. 10, 36].

"6. In September of 1963, Customs Agent Greppin received information from a confidential reliable informant that a Jorge Rodriguez, who had been arrested by Customs Agent Greppin and Sergeant Beckman of the Los Angeles Police Department in July of 1963, in possession of marihuana, was, with a man known as Guillermo Teodor to receive marihuana in Los Angeles to be brought across the border by Miguel Garcia and Cerena Truba." [May 18, 1965 Hearing, R. T. 11, 12].

"7. On September 17, 1963, Customs Agents discovered that Rodriguez was registered at the Blair House in Hollywood where he was associating with a man registered under the name of J. Martinez, but identified as Guillermo Teodor, who was known by Customs Agent Greppin to have previously been arrested with marihuana in his possession." [May 18, 1965 Hearing, R. T. 12].

"8. Through sound surveillance at the Blair House, Customs Agents determined that Martinez (nee Teodor) and Rodriguez were to receive a large quantity of marihuana that same day." [May 18, 1965 Hearing, R. T. 12].

"9. As a result of this information, Customs Agent Greppin and Sergeant Beckman placed with all



airlines at the Los Angeles International Airport a lookout for all persons registering under the name of Martinez on all New York flights." [May 18, 1965 Hearing, R. T. 12].

"10. Based on their investigation prior to the instant matter, Customs Agent Greppin and Sergeant Beckman had established the following modus operandi for marihuana traffickers going between Los Angeles and New York: 'Young Latin female couriers checked overweight baggage containing marihuana into the counters at American and Trans World Airlines immediately prior to flight time.' Additionally, the flights were invariably non-stop flights from Los Angeles to New York City." [May 18, 1965 Hearing, R. T. 6, 7].

"11. On the evening of September 17, 1963, Customs Agent Greppin and Sergeant Beckman received a radio call that a person had called in for reservations on the 10:00 p.m. flight to New York on American Airlines under the name of Martinez, and proceeded to the Los Angeles International Airport where they took up surveillance near the American Airlines ticket counter." [May 18, 1965 Hearing, R. T. 42, 43].

"12. At approximately 9:50 p.m., at the previously described position, Greppin saw the defendants DeOca and Cipres get out of a 1959 salmon



colored Pontiac, California license LMC 357, a car registered to Manuel Gonzalez. The officers watched as defendant DeOca removed two suitcases from the car [Exs. 1 and 2], and handed them to a porter stationed at curbside. DeOca was then observed to get back into the Pontiac and drive away from the terminal." [May 18, 1965 Hearing, R. T. 12, 13, 14] [R. T. 135, 138, 179(a)].

"13. Defendant Cipres followed the porter to the American Airlines ticket counter. The porter carried two large, lightweight-type bags known to Customs Agent Greppin as the same type of luggage involved in other marihuana trafficking cases." [May 18, 1965 Hearing, R. T. 15].

"14. Customs Agent Greppin and Sergeant Beckman heard defendant Cipres call for a reservation under the name of Martinez and observed the weight of the two bags when placed on the weighing machine, 140 pounds." [May 18, 1965 Hearing, R. T. 15, 16].

"15. Customs Agent Greppin and Sergeant Beckman then approached defendant Cipres, identified themselves as police officers and stated that they were conducting a narcotic investigation concerning her. When asked for identification, defendant Cipres admitted that her real name was Ramona Cipres,





but indicated that she sometimes used the name Martinez when travelling." [May 18, 1965 Hearing, R. T. 17, 18] [R. T. 142, 165].

"16. At approximately 9:55 p.m., Customs Agent Greppin noticed that one of defendant Cipres' bags was put on the moving conveyor belt which took the luggage down to the loading platform near the plane, and asked the luggage handler to retrieve the suitcase from the conveyor belt. The handler had to run to retrieve it. Meanwhile the second bag had been retrieved by Sergeant Beckman from the scale." [May 18, 1965 Hearing, R. T. 18, 19, 20].

"17. Following the removal of the bags from the conveyor belt and the scale, defendant Cipres was questioned further. Defendant Cipres, during this initial conversation, indicated that she had stayed at Monte Villa, and had just come from a friend's home in a cab in order to catch a plane for New York." [R. T. 166].

"When first asked about the contents of her suitcase she claimed she had clothes in them, but when queried as to how clothing could give so much weight to the suitcases, admitted, 'Well, I don't only have clothes in there, but I have cosmetics in there as well.' [R. T. 166].

"Asked if they could search her suitcases,



defendant Cipres responded, 'Yes, I have nothing to hide.' When asked for the keys she added, 'The bags are locked and the keys are in New York.' " [R. T. 166, 145].

"18. At this point Greppin returned to the bag he had removed from the conveyor belt, picked it up, and by pushing the sides in and placing his nose to the seam of the suitcase, smelled an odor familiar to him, that of marihuana. He thereupon opened the suitcases, which were found to be already unlocked and discovered the marihuana contained therein." [R. T. 147, 162, 184].

"19. Agent Greppin walked over to Sergeant Beckman and defendant Cipres and advised defendant Cipres she was under arrest. The other bag was subsequently opened at the airport and found to contain marihuana. Both bags were unlocked." [R. T. 186, 162].

"20. The Court finds, inasmuch as there was no additional evidence presented by the plaintiff to the point, that defendant Cipres had not been warned of her constitutional immunity from unreasonable search and seizure, and, in light of all the facts, did not intentionally relinquish a known right and privilege.

"21. The Court further finds that the actions

1871-1872. The first year of the year.

1872-1873. The second year of the year.

1873-1874. The third year of the year.

1874-1875. The fourth year of the year.

1875-1876. The fifth year of the year.

1876-1877. The sixth year of the year.

1877-1878. The seventh year of the year.

1878-1879. The eighth year of the year.

1879-1880. The ninth year of the year.

1880-1881. The tenth year of the year.

1881-1882. The eleventh year of the year.

1882-1883. The twelfth year of the year.

1883-1884. The thirteenth year of the year.

1884-1885. The fourteenth year of the year.

1885-1886. The fifteenth year of the year.

1886-1887. The sixteenth year of the year.

1887-1888. The seventeenth year of the year.

1888-1889. The eighteenth year of the year.

1889-1890. The nineteenth year of the year.

1890-1891. The twentieth year of the year.

1891-1892. The twenty-first year of the year.

1892-1893. The twenty-second year of the year.

1893-1894. The twenty-third year of the year.

1894-1895. The twenty-fourth year of the year.

1895-1896. The twenty-fifth year of the year.

1896-1897. The twenty-sixth year of the year.

1897-1898. The twenty-seventh year of the year.



of Customs Agent Greppin and Sergeant Beckman at the Los Angeles International Airport on the evening of September 17, 1963 in the period between 9:30 p. m. to 10:00 p. m. were at all times reasonable and prudent.

"22. The Court further finds from all the evidence in the case that at the time the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that defendant Cipres was committing an offense and that the removal of the evidence was threatened.

"23. The search was valid as incident to a substantially contemporaneous arrest, for the officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve the material subject to seizure.

"24. Having reasonable cause to believe that there was marihuana in the two trunks in question which had been unlawfully introduced into the United States, the search was also justified by 19 U. S. C. A. Section 482.

## II

"WHEREFORE, This Court Concludes:

"That the files and records of the case, the



Reporter's and Clerk's Transcript of Proceedings, the Reporter's Transcript of the hearing of May 18, 1965, conclusively show that the defendants are entitled to no relief; that the judgment herein was lawfully rendered, and that there has been no denial or infringement of their constitutional rights; that the evidence was properly admitted; that the evidence was not secured by conduct violating defendant Cipres' constitutional rights.

/s/ Harry C. Westover  
UNITED STATES DISTRICT JUDGE

"APPROVED:

HAROLD J. ACKERMAN  
Attorney for Defendant Cipres

WM. BRYAN OSBORNE  
Attorney for Defendant DeOca"



IV  
ARGUMENT

---

I      THE SEARCH AND SEIZURE OF APPELLANT CIPRES' BAGGAGE AT THE LOS ANGELES INTERNATIONAL AIRPORT WAS VALID AS INCIDENT TO A SUBSTANTIALLY CONTEMPORANEOUS LAWFUL ARREST.

---

A.      The Search and Seizure Were Contemporaneous to the Arrest.

---

To justify arrest of appellant Cipres, and the contemporaneous search and seizure of marihuana, the officers in charge must have been possessed of reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing or had committed an offense, and that the evidence was threatened by either imminent destruction or removal. Beck v. Ohio, 379 U.S. 89, 91 (1964).

The answer to the inquiry as to precisely when appellant Cipres was arrested, should not be entirely dispositive of the question whether the search and seizure was lawful as based upon probable cause. As was noted by this Court in its earlier remand of the case, "We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that





immediate search was necessary to preserve material subject to seizure". Cipres v. United States, 343 F.2d 95 (9th Cir. 1965).

Thus, the main question to answer should be: Did the officers have probable cause to arrest her prior to the seizure of the baggage? Before answering this question, let us first determine just when the arrest of appellant Cipres occurred. There is, at best, a general guideline which must be applied to each specific factual situation. In Henry v. United States, 361 U.S. 98, 103 (1959), it was held that: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." Applying this test to the facts here presented, it appears that appellant Cipres was restricted in the freedom to move as she pleased, no earlier than the point in time when Customs Agent Greppin and Sergeant Beckman took control of her baggage while she was waiting at the check-in counter. Certainly, prior to this time there was no semblance of what might be considered an arrest or limitation on her freedom. That being the case, the following questioning of appellant Cipres as to the contents and the subsequent opening of the bags were certainly incident to the substantially contemporaneous arrest.

Dickey v. United States, 332 F.2d 773

(9th Cir. 1964).



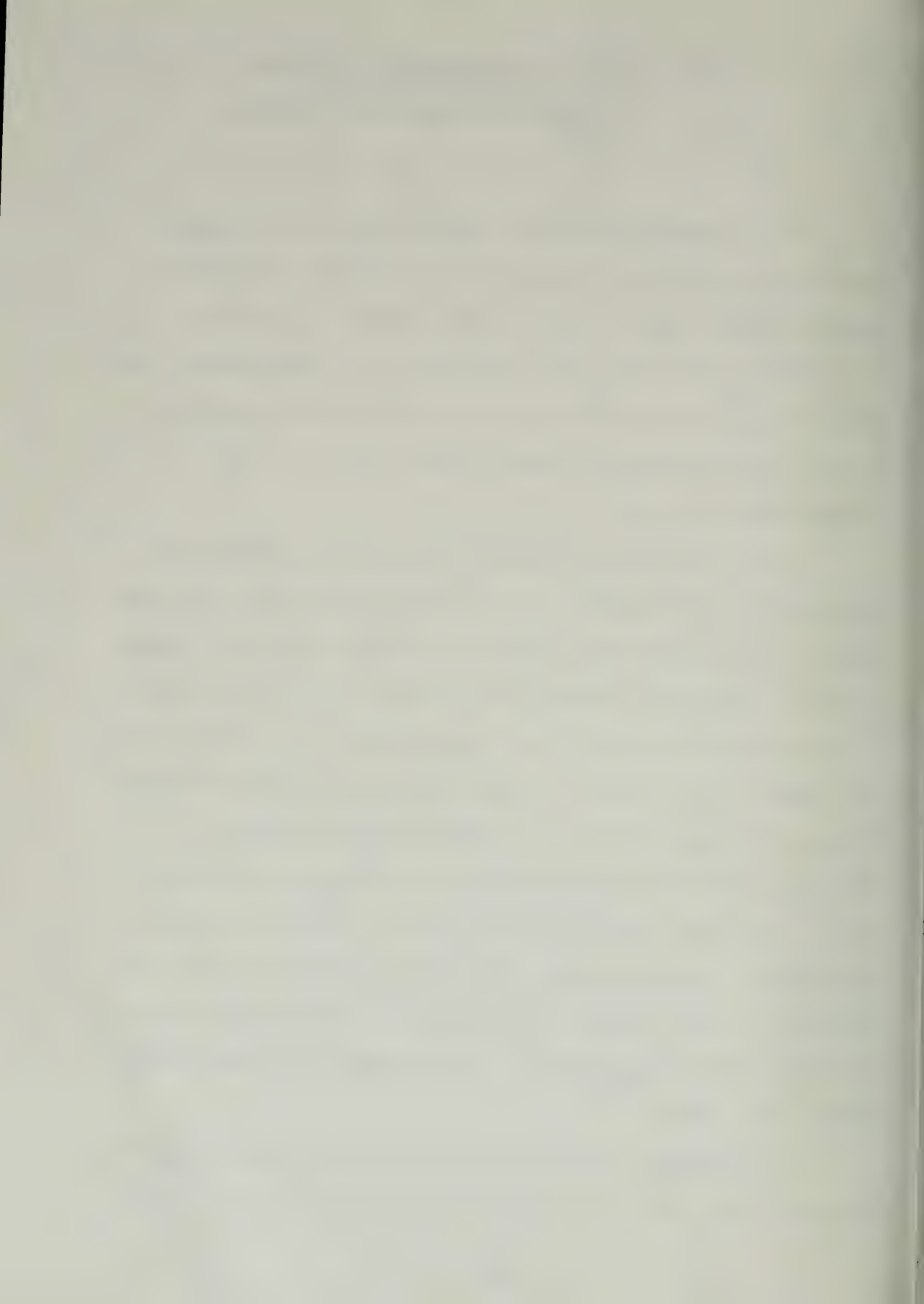
B.       The Contemporaneous Arrest and  
          Search of Appellant Cipres'  
          Baggage was Based upon Probable  
          Cause.

---

The arrest and seizure by Agent Greppin and Sergeant Beckman were based on trustworthy and reliable information of specific details, which, when corroborated by the personal observations of the officers immediately prior to the arrest, were sufficient to warrant a prudent man in believing that appellant Cipres was committing an offense and that removal of the evidence was imminent.

Prior to the moment where Agent Greppin and Sergeant Beckman arrested appellant Cipres and seized her bags, they had probable cause to believe an offense was being committed. Agent Greppin and Sergeant Beckman were aware of a recurring pattern in incidents involving the illicit transportation of marihuana from Los Angeles to New York. Young female Latin couriers checked overweight baggage containing marihuana into the counters at American and Trans-World Airlines immediately prior to flight time. The flights were invariably non-stop. The officers also were aware of numerous other details of this pattern, as found by the District Court, *supra*. This pattern is substantially identical to that involved in Hernandez v. United States, No. 19654 (9th Cir. October 29, 1965).

In Hernandez, the police were aware of a recurring pattern whereby Latin-American couriers were buying non-stop tickets





to New York; their bags were overweight and there were no advance reservations made; the couriers invariably used the same type of baggage which was locked with combination locks. The officers in Hernandez arranged for the airport employees to notify them if anyone fitting the described pattern arrived at the airline terminal. In the instant case, Agent Greppin and Sergeant Beckman went to the airport to determine whether a passenger, with a reservation under the name of Martinez, fit the pattern above described. Here their prior inquiry was even more specific than that of the officers in the Hernandez case. Not only were they looking for someone who fit a particular pattern, but were looking for a person who would be flying to New York that very day, under the name of Martinez. Through reliable information, the Agents had learned that Rodriguez and a person using the name of Martinez were going to receive a large shipment of marihuana earlier during the same day. The agents through their investigation established that in fact one J. Martinez was Guillermo Teador whom they had previously arrested in possession of marihuana and whom they knew to be a courier of marihuana between Los Angeles and New York. Having determined that, the agents surmised that Teodor and Rodriguez would ship the marihuana to New York that evening and for that reason caused a lookout to be placed at Los Angeles International Airport for anyone registering under the name of J. Martinez.

At the time Agent Greppin and Sergeant Beckman saw appellant Cipres drive up to the terminal with appellant DeOca,



they were unaware that appellant Cipres was in fact the person who had a reservation for New York, under the name of Martinez. Certainly they were put on notice, however, when Agent Greppin recognized appellant DeOca as a person whom he had investigated previously for involvement in narcotics traffic. Appellant Cipres, especially under these circumstances, fit the known pattern precisely. Hernandez v. United States, supra.

There was present a composite set of facts which would have led any reasonably prudent man to suspect that a crime was being committed:

(a) That Guillermo Teador, utilizing the fictitious name Martinez, and known to the agents as being a courier of marihuana from Los Angeles to New York, and one Rodriguez, were receiving a shipment of marihuana that day;

(b) The officers seeing appellant Cipres drive up to the airport with a suspected narcotics violator, appellant DeOca, who assisted her in removing the bags from the car;

(c) Appellant Cipres calling for her ticket under the name of Martinez;

(d) The fact that the baggage which appellant Cipres carried was of the same type as had been used in previous narcotics trafficking cases; and

(e) The fact that every incident viewed by the officers at the airport fell into line with the known pattern utilized by previous marihuana couriers, i. e., overweight baggage, non-stop ticket to New York, female Latin courier, and arrival



immediately prior to flight time.

All of the foregoing facts were known to the officers prior to appellant Cipres' arrest.

As said in Hernandez, supra, at P. 4,

"No one of the indicia drawn from prior incidents of illicit traffic was alone sufficient to justify a reasonable man in the belief that appellant's bags contained contraband, but taken together they rendered it probable."

All elements of the known pattern of incidents in narcotics trafficking were here present. Each of them was specific and narrowly descriptive. Actually, Agent Greppin and Sergeant Beckman acted here upon a higher quantum of probable cause than did the officers in Hernandez. Not only did appellant Cipres fit the suspected fact pattern but the officers were also acting upon the additional reliable information that a shipment of marihuana was to be received that day by a man known to be a courier of marihuana between Los Angeles and New York.

This is a case where the officers had prior and specific information which was corroborated by their on-the-spot observations. Draper v. United States, 358 U. S. 307 (1958).

The record shows that the officers saw, heard, and otherwise perceived facts sufficient to give them ground for belief that appellant Cipres had acted or was acting unlawfully. Beck v. Ohio, supra, at P. 94.

Appellants have complained that the officers arrested





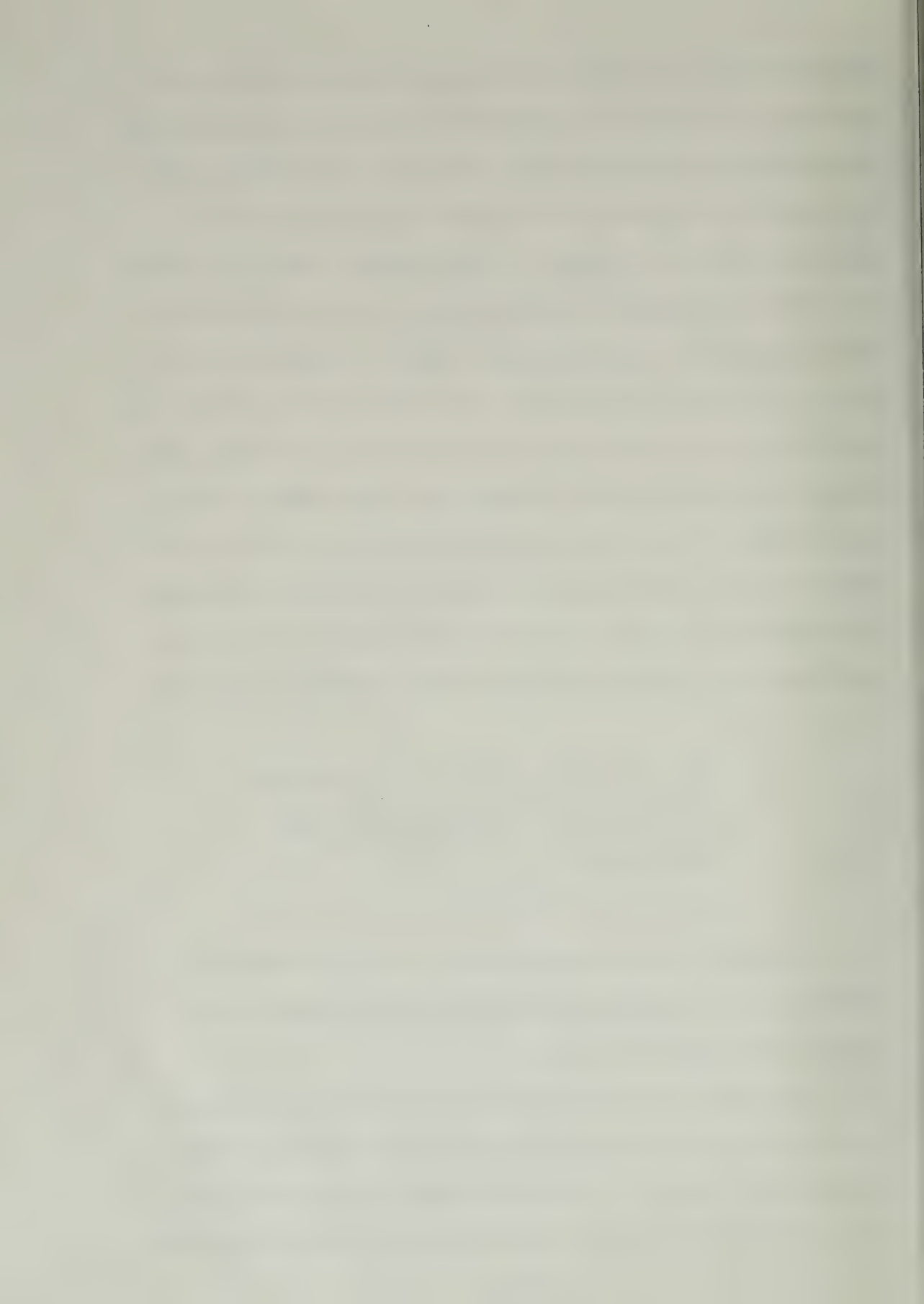
appellant Cipres and seized her baggage without a warrant. No such warrant was required, the search being incident to a lawful arrest and for the further reason that there was probable cause to believe that contraband was present and threatened with immediate removal. Dickey v. United States, 332 F.2d 773 (9th Cir. 1964); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Hernandez v. United States, supra. The case at hand is precisely one where an arrest or search warrant would have been impossible to procure prior to removal of the contraband. The officers went to the airport at night with a knowledge of certain specific facts. These facts needed on-the-spot corroboration before a search warrant could have issued. At the very moment that the officers corroborated their prior specific information, they had to act or allow the baggage to be removed to New York.

II. THE DISTRICT COURT DID NOT ERR  
IN REFUSING TO FORCE THE  
GOVERNMENT TO DISCLOSE THE  
IDENTITY OF A CONFIDENTIAL  
INFORMANT.

---

Appellant Cipres complains that the Court erred in its refusal to order the Government to disclose the identity of a reliable confidential informer.

The informant in question was not an active participant in nor a percipient witness to the substantive crime. Indeed, the information which he provided to Agent Greppin was given in September 1963, and was to the effect that a Jorge Rodriguez,

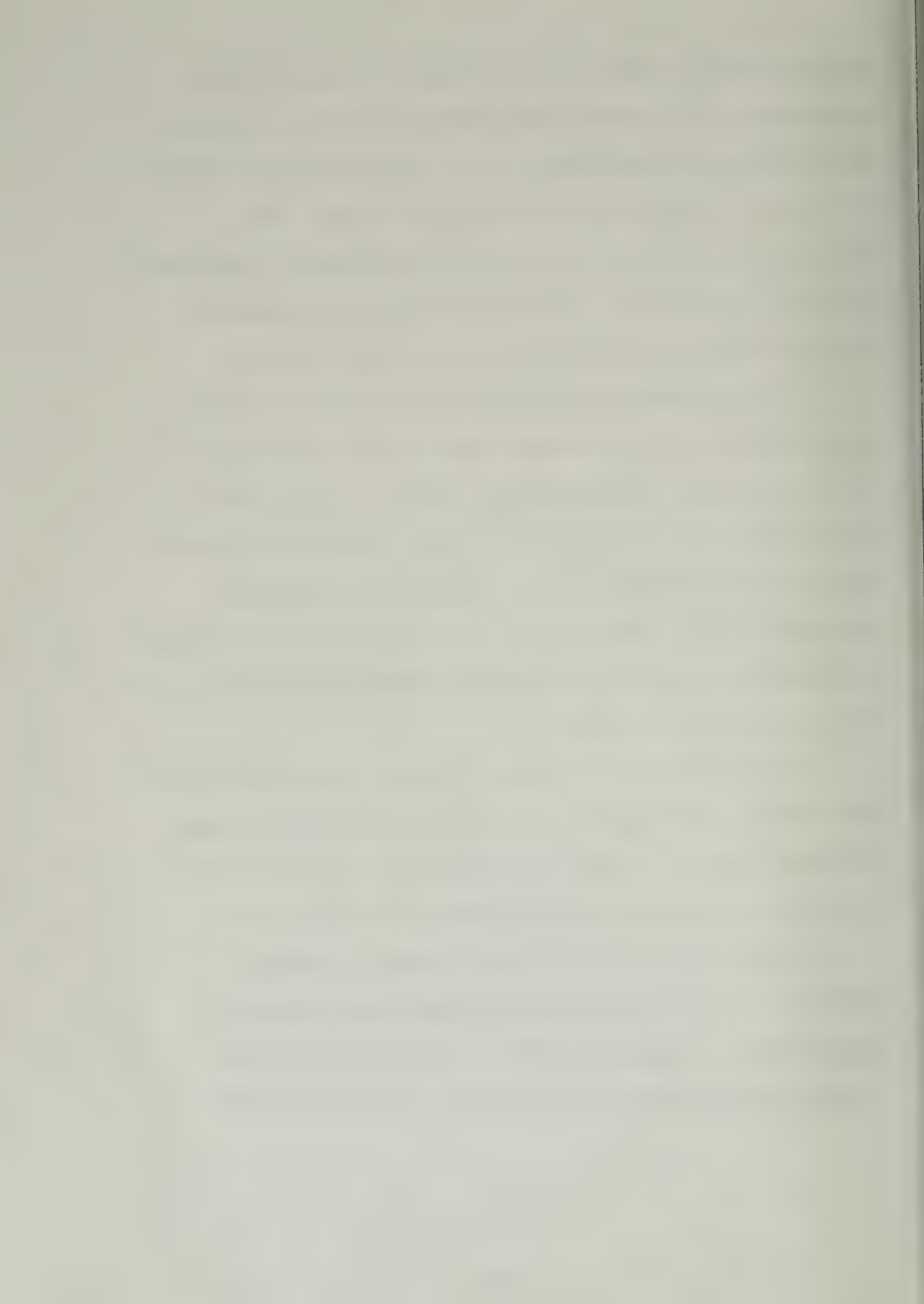


who had been arrested by Agent Greppin in July of 1963 in possession of marihuana, was with a man known as Guillermo Teodor to receive marihuana in Los Angeles to be brought across the border by Miguel Garcia and Cerena Truba. This information was fully corroborated by surveillance at the Blair House on September 17, 1963 by Customs Agents (Special Findings of Fact and Conclusions of Law Nos. 6 and 7).

The general rule regarding whether the Government should be forced to disclose the identity of its informers is found in Roviaro v. United States, 353 U.S. 53, 62 (1957), which holds that a confidential informant need not be revealed and that his anonymity is to be retained unless there is a showing that he is connected with the commission of the offense, or disclosure of his identity would be otherwise essential to a fair determination of the cause.

It is clear that revealing the name of the informant who was neither a participant nor a witness to the crimes alleged would have been of no aid to the appellants, and could hardly be deemed essential to a fair determination of the cause.

In this light the Court was completely justified in refusing to require disclosure of the informant's identity. United States v. Rugendorf, 316 F.2d 589 (7th Cir. 1963); Hurst v. United States, 344 F.2d 327, 328 (9th Cir. 1965).





CONCLUSION

Inasmuch as the seizure of appellant Cipres' baggage at the Los Angeles International Airport was valid as incident to a substantially contemporaneous arrest, the information obtained as a result of that seizure was not tainted, and did not "poison" the evidence found at the garage of Manuel Gonzales, i. e., the marihuana which was the subject of Count Two.

For the reasons stated, the judgments of the District Court, as to both appellants, should be affirmed.

Respectfully submitted,

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United States Attorney,

JOHN VAN DE KAMP,

Assistant United States Attorney

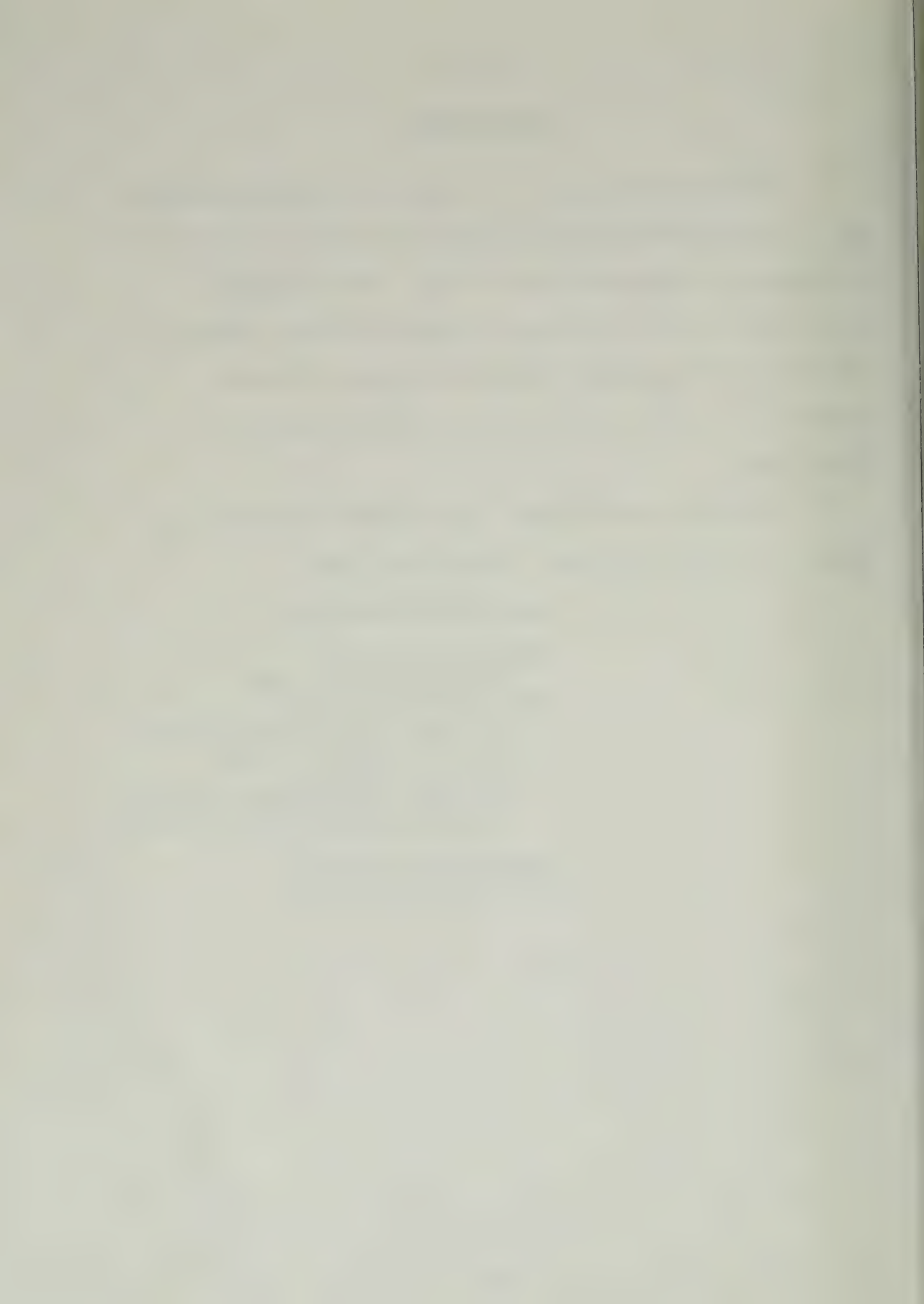
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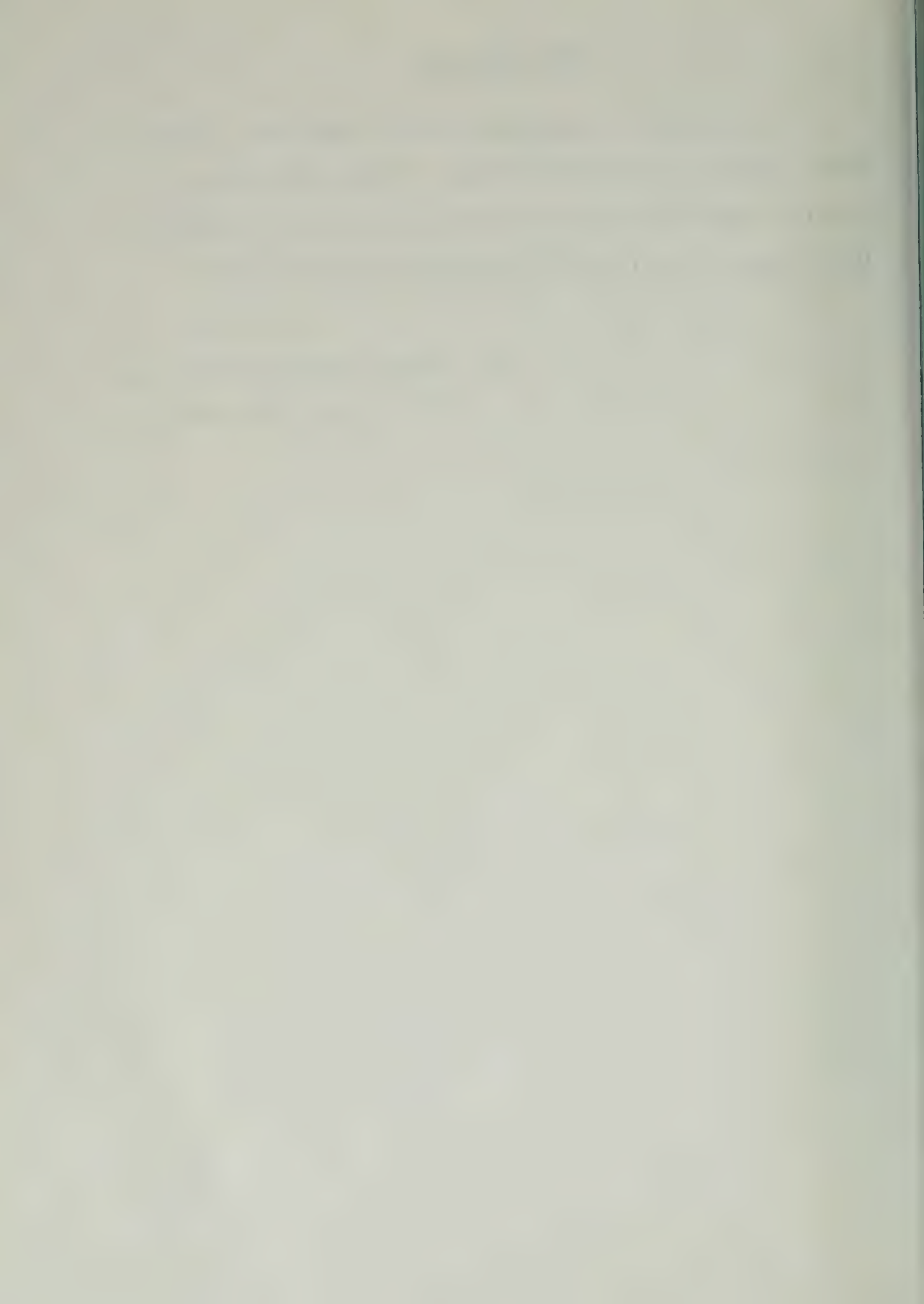


## CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ John K. Van de Kamp

JOHN K. VAN DE KAMP









Received  
Mar 22 1965  
U. S. Attorney  
Los Angeles, Calif.

APPENDIX "A"

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

RAMONA CIPRES and JUAN MONTES DeOCA,	)	
	)	
Appellants,	)	
vs.	)	No. 19,217
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

---

[Mar. 18, 1965]

Appeal from the United States District Court  
for the Southern District of California  
Central Division

---

Before: HAMLEY, KOELSCH, and BROWNING, Circuit Judges  
BROWNING, Circuit Judge:

Ramona Cipres and Juan Montes DeOca appeal from convictions for trafficking in marihuana contrary to 21 U. S. C. A. §176(a).

I

Appellants argue that the district court erred in admitting into evidence two suitcases containing marihuana, contending that the evidence was secured by conduct violating Cipres' Fourth Amendment right to freedom from unreasonable search and seizure.



The marihuana was discovered and seized at the Los Angeles International Airport by a Customs agent and an officer of the Los Angeles Police Department. Their testimony relevant to the search and seizure was as follows: In September 1963, a man known to be engaged in narcotics traffic between Los Angeles and New York City checked in at a Los Angeles hotel under the assumed name of "Martinez." The airline companies were asked to advise the authorities of any reservations made in that name. On September 17, American Airlines informed the Customs Service that such a reservation had been made for an evening flight to New York City. The Customs agent and the police officer stationed themselves near American Airlines' check-in counter. Shortly before the scheduled departure time of the flight a car drove up to the adjacent curb and both appellants alighted. The Customs agent recognized DeOca as a person he had investigated earlier for possible involvement in narcotics traffic. DeOca took two suitcases from the car trunk, set them on the curb, returned to the car, and drove off. A porter took the bags to the check-in counter and set them on the scale. Cipres followed. The Customs agent observed that the bags weighed 140 pounds, and heard Cipres ask for a reservation in the name "Martinez". The officers identified themselves to Cipres, told her they were conducting a narcotics investigation, and wished to talk with her. In response to their questions, she told them her name was Cipres, but that she sometimes used the name Martinez in traveling. She said the bags contained clothing, but added, in explanation of their weight, that they also contained cosmetics.





The officers told Cipres they suspected the bags contained marihuana. She denied it. They asked if they could search the bags. She answered, "Yes, I have nothing to hide," but added that she had left the keys in New York City. They examined the bags and found them unlocked. The Customs agent opened the bags, discovered the marihuana, and arrested Cipres.

Cipres denied consenting to the search. She testified that the officers accosted her and asked about the contents of the bags. She asked if they had a search warrant, but they simply proceeded to open the bags. The officers admitted that Cipres asked if they had a search warrant, but only after the Customs agent had opened the bags with her permission and discovered the marihuana.

The district court treated the issue as simply whether or not Cipres told the officers they might search the suitcase. Seeing "no reason why I should disbelieve the testimony of the two officers," the court admitted the evidence.

But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the "intentional relinquishment of a known right or privilege."

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced,



and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld.<sup>1</sup> We recently sustained a district court finding that such waiver was lacking despite an express verbal consent,<sup>2</sup> and such cases are common.<sup>3</sup> They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.<sup>4</sup>

Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her assent may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it was obtained "under color of the

---

1 See generally, Comment, 113 U. Pa. L. Rev. 260 (1964).

2 *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964), affirming Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963).

3 See, e.g., *United States v. Marrese*, 336 F.2d 501, 504 (3d Cir. 1964); *Pekar v. United States*, 315 F.2d 319, 324-25 (5th Cir. 1963); *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962); *Chanel v. United States*, 285 F.2d 217, 219 (9th Cir. 1960); *Higgins v. United States*, 209 F.2d 819, 820 (D. C. Cir. 1954); *Nelson v. United States*, 208 F.2d 505, 513 (D. C. Cir. 1953); *Catalanotte v. United States*, 208 F.2d 264, 268 (6th Cir. 1953); *Judd v. United States*, 190 F.2d 649, 651 (D. C. Cir. 1951). See also *Greenwell v. United States*, 336 F.2d 962, 967-68 (D. C. Cir. 1964).

4 *Manwaring*, 16 Stan. L. Rev. 318, 334-35 (1964).



badge" and therefore presumptively coerced;<sup>5</sup> it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual;<sup>6</sup> it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened;<sup>7</sup> and admittedly Cipres asked if the officers had a search warrant.

Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present record or after such further hearing as the court may deem appropriate.<sup>8</sup>

As we have noted, Cipres was arrested immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident

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5 United States v. Page, 302 F.2d 81, 84 (9th Cir.1962).

6 Application of Tomich, supra, note 1, 221 F. Supp. at 503.

7 Channel v. United States, 285 F.2d 217, 221 (9th Cir.1960); Higgins v. United States, 209 F.2d 819, 820 (D. C. Cir.1954); Judd v. United States, 190 F.2d 649, 651 (D. C. Cir.1951). See also United States v. Smith, 308 F.2d 657, 663 (2d Cir.1962). But see Martinez v. United States, 333 F.2d 405, 407 (9th Cir.1964), vacated and remanded \_\_\_\_ U. S. \_\_\_\_ (March 15, 1965).

8 See Martinez v. United States, \_\_\_\_ U. S. \_\_\_\_ (March 15, 1965); Rios v. United States, 364 U.S. 253, 260-62 (1960); Masiello v. United States, 304 F.2d 399, 401 (D. C. Cir.1962); United States v. Page, 302 F.2d 81, 86 (9th Cir.1962).





to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure.<sup>9</sup>

Thus the inquiry would be whether at the moment the bags were searched<sup>10</sup> the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres

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9 *Dickey v. United States*, 332 F.2d 773, 778 (9th Cir.1964); *Fernandez v. United States*, 321 F.2d 283, 286-87 (9th Cir.1963); *Busby v. United States*, 296 F.2d 328, 332 (9th Cir.1961). See also *United States v. Haley*, 321 F.2d 956, 958 (6th Cir.1963). Compare *Mosco v. United States*, 301 F.2d 180, 187-88 (9th Cir.1962); *Shadoan*, *Law and Tactics in Federal Criminal Cases* 67 (1964); *Collins*, 50 *Calif. L. Rev.* 421, 441-42 (1962); *Manwaring*, 16 *Stan. L. Rev.* 318, 344-46 (1964); *Orfield*, 24 *La. L. Rev.* 665, 681-82 (1964). The Supreme Court has reserved the question. *Ker v. California*, 374 U.S. 23, 42-43 (1963). See also *Stoner v. California*, 376 U.S. 483 (1964).

It has been suggested that since the rule has been applied only where there were reasonable grounds to believe that imminent destruction or removal of material subject to seizure was threatened (prior to the searches in *Busby* and *Haley* the officers saw, and in *Fernandez* smelled, probable contraband in temporarily stopped automobiles; in *Dickey*, a probable possessor of narcotics was moving toward a bathroom), and hence is merely an application of the accepted principle that the Fourth Amendment does not preclude a search without a warrant in such "exigent circumstances." *Manwaring*, 16 *Stan. L. Rev.* 318, 344 (1964). See also *Mosco v. United States*, 301 F.2d 180, 187-88 (9th Cir.1962). The "exigent circumstances" exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (*United States v. Ventresca*, U.S. n.2 (March 1, 1965); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Johnson v. United States*, 333 U.S. 10, 14 (1948)), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal or destruction.

10 Of course, nothing disclosed by the search could be considered to justify the arrest. *United States v. Di Re*, 332 U.S. 581, 595 (1948).



was committing an offense,<sup>11</sup> and that removal of the evidence was threatened.<sup>12</sup> But these also are questions of fact to be decided initially by the district court. That court has not yet done so; having found that Cipres "consented" to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U. S. C. A. §482.<sup>13</sup> To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand.

## II

The appellants' remaining specifications of error are insubstantial.

1. It is true, of course, that proof of mere proximity to the drug would be insufficient to establish actual or constructive "possession" within the meaning of 21 U. S. C. A. § 176(a).<sup>14</sup> However, the testimony regarding Cipres' responses to the officers' inquiries as to contents of the bags, plus the natural inferences

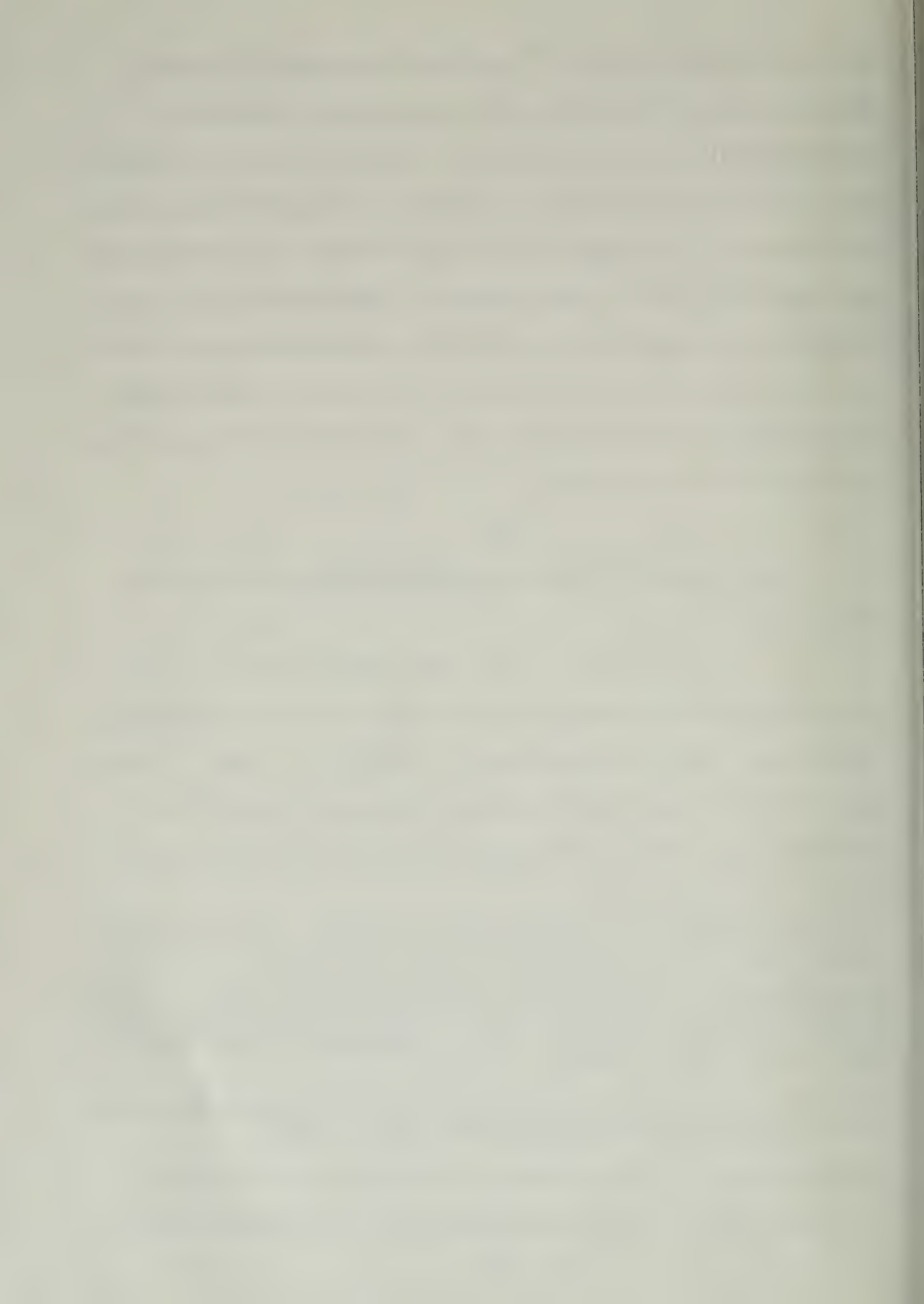
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11 This accepted definition of probable cause for arrest was most recently restated by the Supreme Court in *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The "reasonable grounds" to believe that an offense is being committed, authorizing a Customs agent to make an arrest without a warrant under 26 U. S. C. A. § 7607(2), is the equivalent of Fourth Amendment "probable cause." *Wong Sun v. United States*, 371 U.S. 471, 478 n. 6 (1963).

12 In addition to other facts recited earlier, it appeared that one of the bags had been placed on the airline conveyor belt.

13 See *Romero v. United States*, 318 F.2d 530 (5th Cir. 1963).

14 *Arellanes v. United States*, 302 F.2d 603, 606 (9th Cir. 1962).





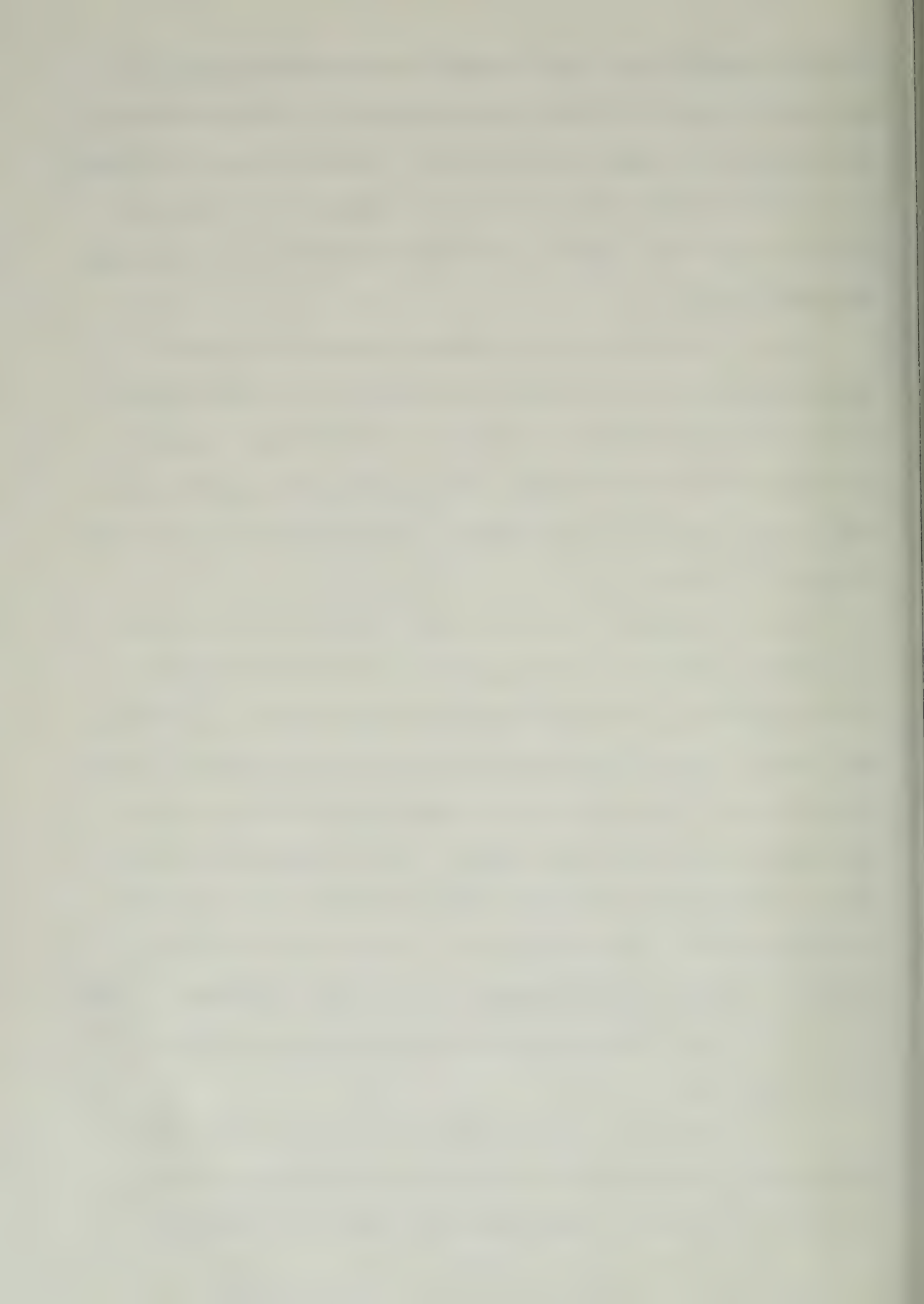
from the evidence as to the placement and movements of Cipres and the suitcases, afforded an adequate basis for the jury's determination that the luggage was in Cipres' immediate physical custody or subject to her dominion and control. Indeed, she testified to as much at the trial, offering an innocent explanation of a possession she did not deny.

2. No argument was offered in support of Cipres' specification of error asserting an insufficiency of proof of knowledge that the bags contained marihuana. Nonetheless, we have satisfied ourselves that the jury could properly infer guilty knowledge from evidence of record which, in the circumstances, we will not pause to detail.

3. Read in context, the trial court's comments upon the evidence, which Cipres suggests were inaccurate, were of minor importance. The court carefully instructed the jury that it was the sole judge of the facts and that the court's comments might be disregarded. No exception was taken at trial to the portions of the charge which Cipres now attacks. "We can find no plain error therein affecting the substantial rights of the appellants, nor can we find any error which would result in a manifest miscarriage of justice." Gilbert v. United States, 307 F.2d 322, 327 (9th Cir.1962).

4. We find no plain error in government counsel's closing argument.

5. Finally, appellant DeOca's argument that evidence concerning a second seizure of marihuana should have been suppressed as the product of the assertedly illegal prior seizure



discussed above cannot be sustained. There is nothing in the record to indicate that the two seizures were related.<sup>15</sup> Appellant DeOca made no suggestion in the trial court that they were. No request was made of the trial court that the evidence be suppressed or excluded as tainted by the earlier seizure, or for any other reason.<sup>16</sup>

Remanded for further proceedings in accordance with this opinion.<sup>17</sup>

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15 Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962); Lowery v. United States, 258 F.2d 194, 196 (9th Cir. 1958).

16 Westover v. United States, \_\_\_ F.2d \_\_\_ (9th Cir. 1965); Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961); compare Henry v. Mississippi, \_\_\_ U.S. \_\_\_ (1965).

17 Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JIMMIE MERL MASON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

---

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JIMMIE MERL MASON,

Appellant,

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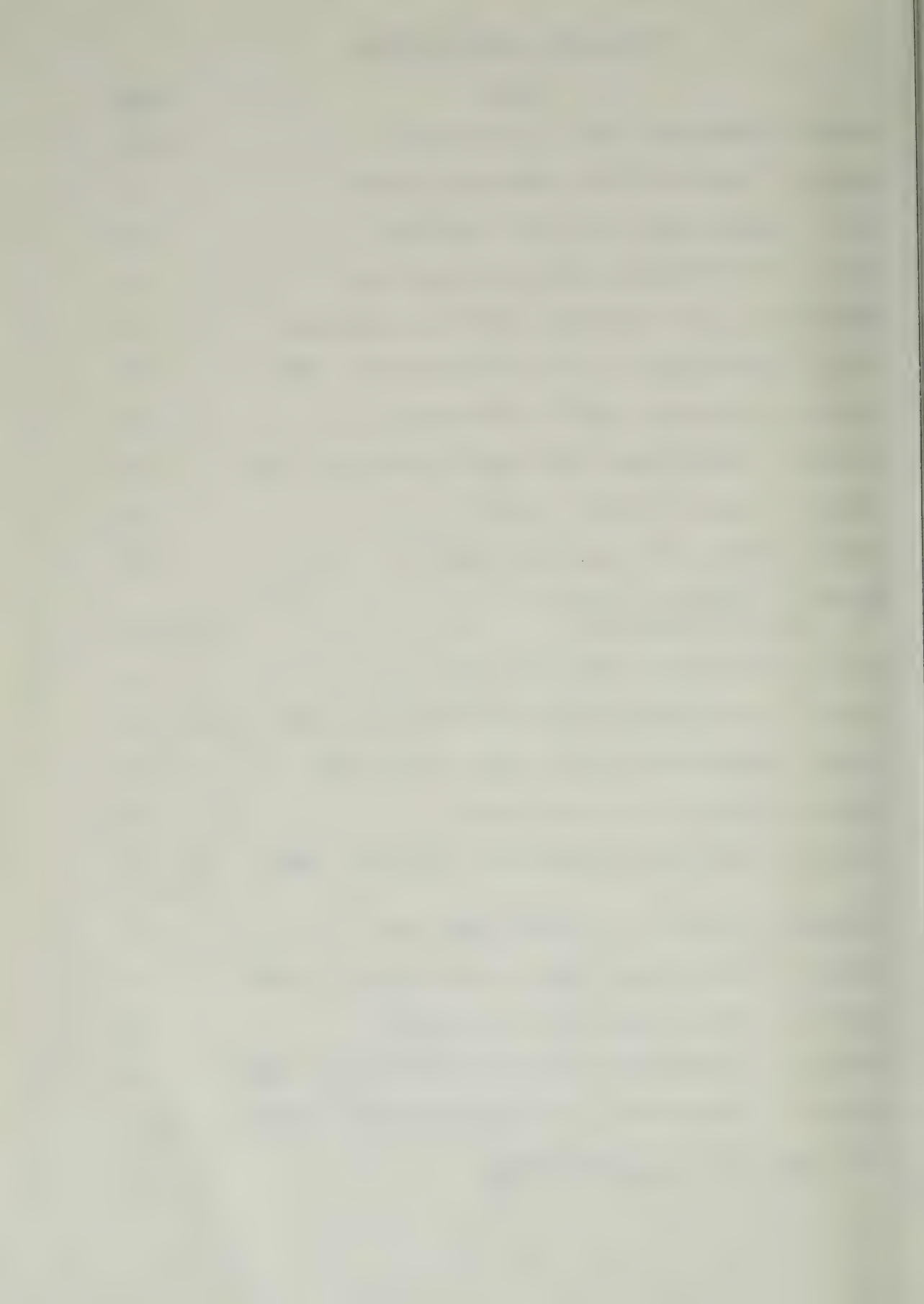
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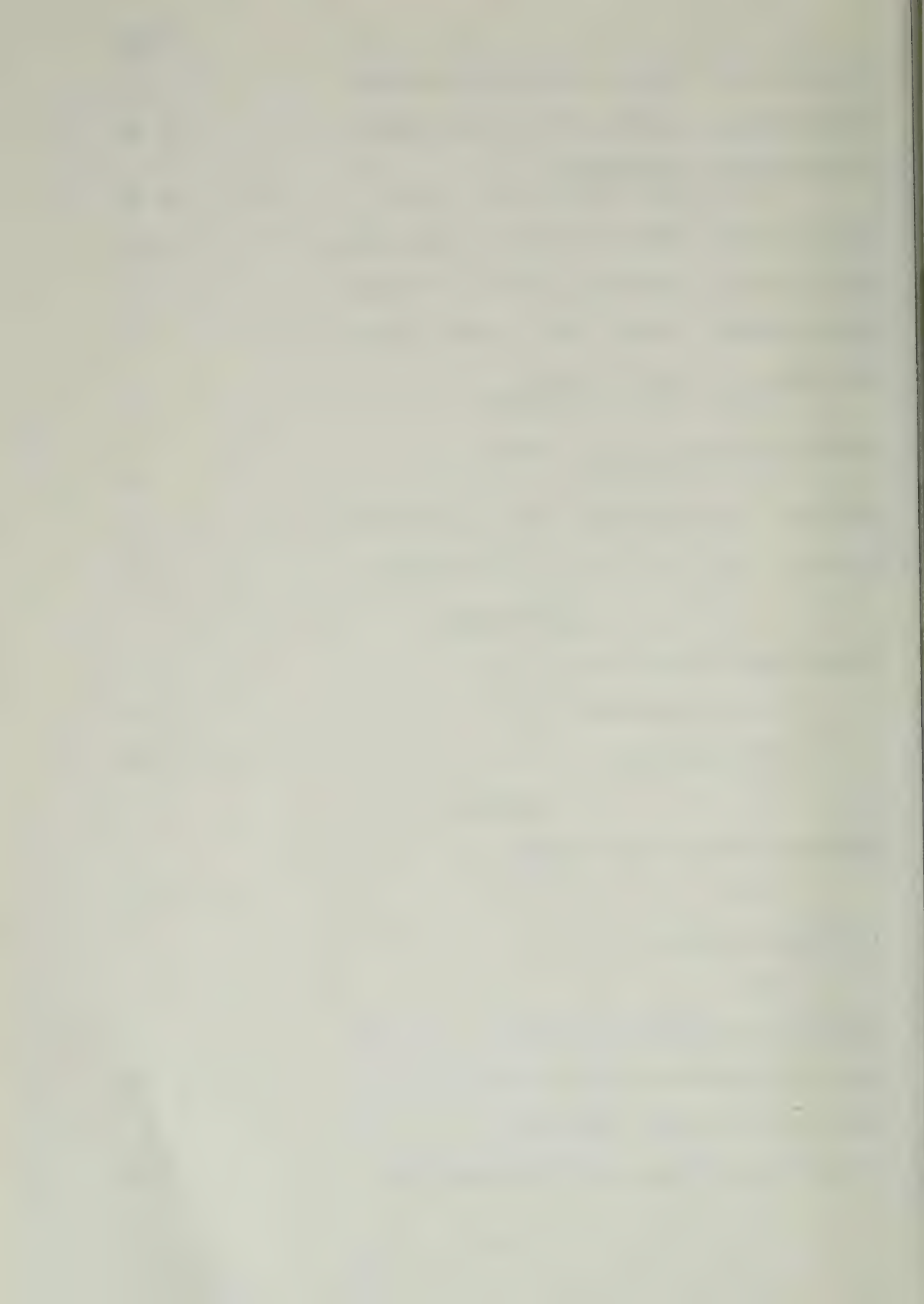
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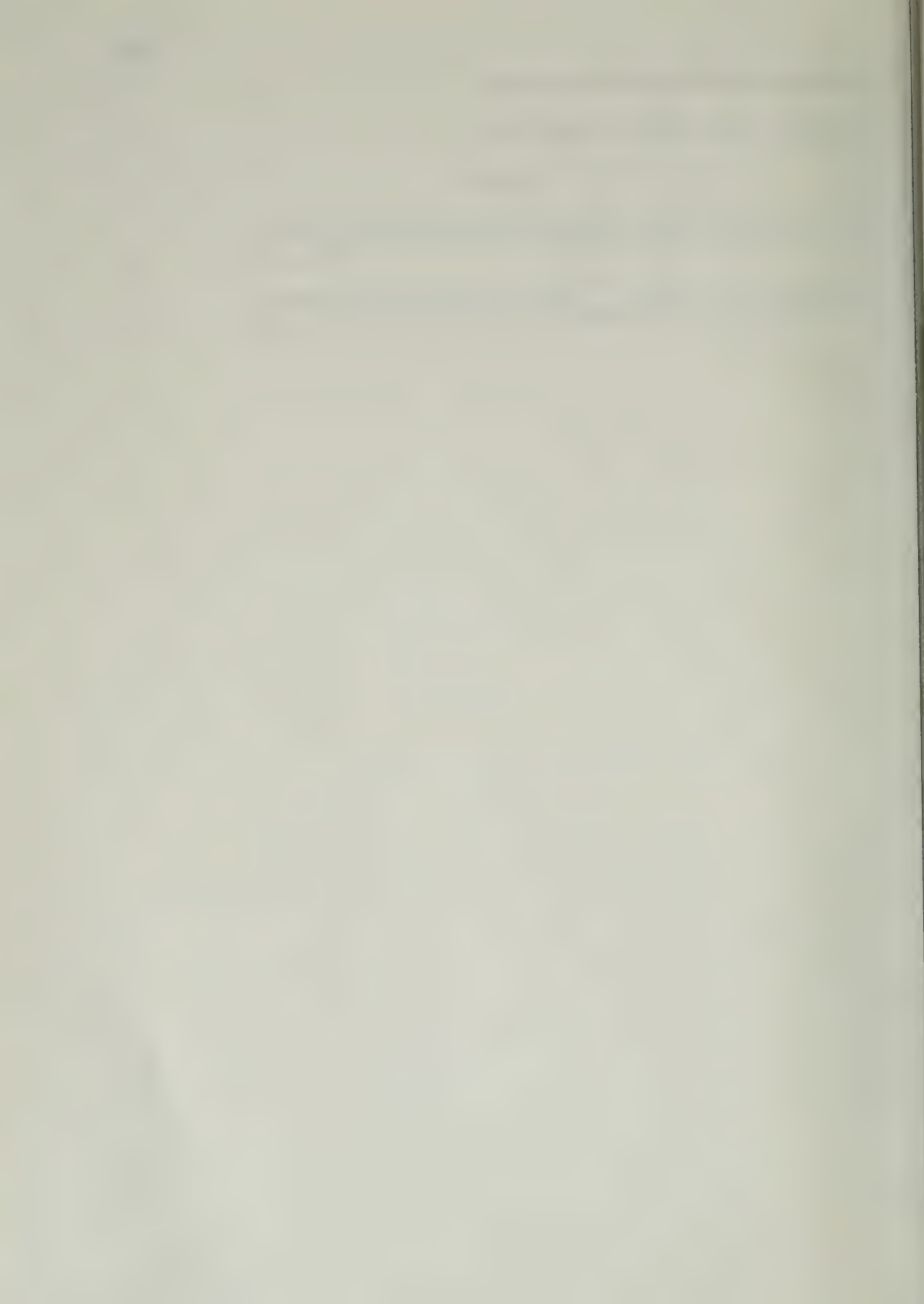


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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JIMMIE MERL MASON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

I

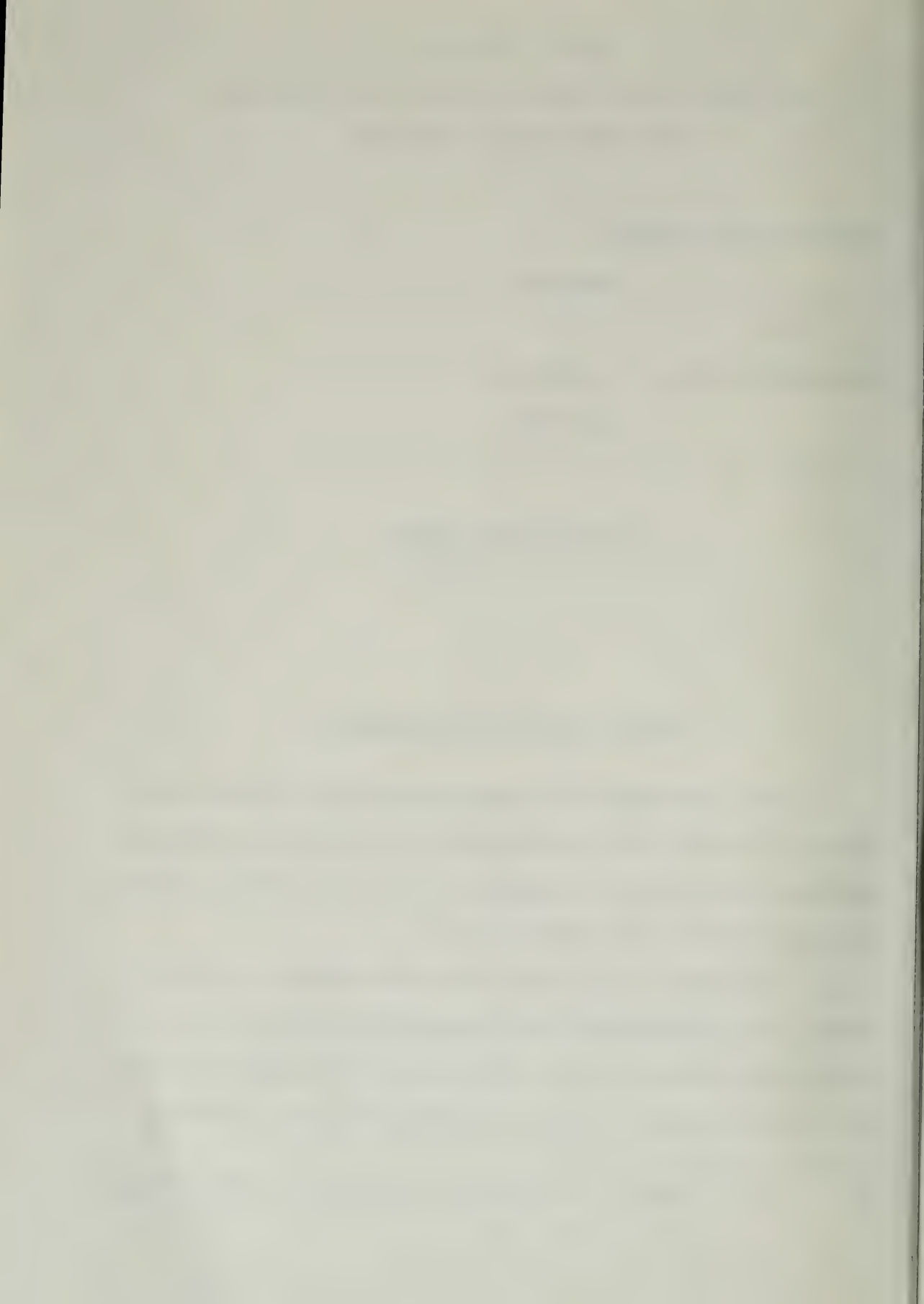
JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment, following trial without a jury. [R. T. 37]. <sup>1/</sup>

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections

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<sup>1/</sup> "R. T. refers to the Reporter's Transcript of Proceedings.



II

STATEMENT OF THE CASE

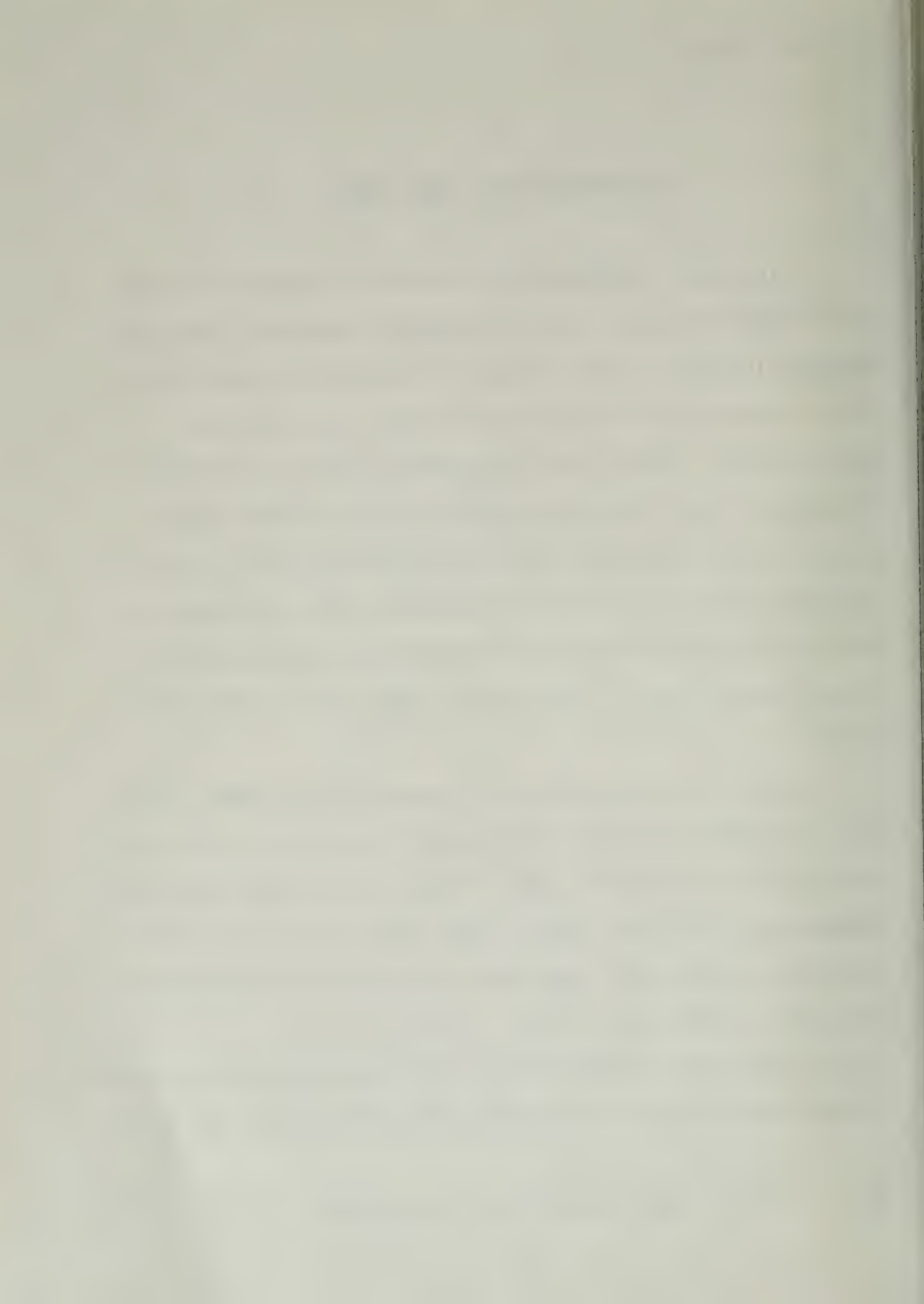
Appellant was charged in a one-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. It was charged that appellant, being a citizen of the United States who was then addicted to and a user of narcotic drugs, entered the United States at the port of Tecate, California, without registering with a Customs official, agent, or employee at said point of entry as required by law, and without surrendering the certificate required by law to be obtained by said appellant upon leaving the United States. The charge was brought under Title 18, United States Code, Section 1407. [C. T. 2]. 2/

Appellant entered a not guilty plea on July 6, 1964. [R. T. 5]. His motion to dismiss the indictment was denied. [C. T. 27]. Trial by jury was waived. [R. T. 25-26]. Court trial commenced on September 22, 1964, before United States District Judge James M. Carter. [R. T. 27]. Appellant was found guilty as charged on November 9, 1964. [R. T. 36].

Thereafter, on December 7, 1964, appellant was committed to the custody of the Attorney General for three years, execution

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2/ "C. T. " refers to the Clerk's Transcript.





of the sentence was suspended, and he was placed on probation for five years. [C. T. 37]. Appellant subsequently filed notice of appeal. [C. T. 46].

### III

#### ERROR SPECIFIED

Appellant's opening brief (pp. 3-4) specifies the following points upon appeal:

"1. The District Court erred in failing to dismiss the indictment.

"2. The statute under which appellant was indicted, tried and sentenced, to-wit, Title 18, U.S.C., Section 1407, is unconstitutional in whole or in part when applied to appellant." 3/

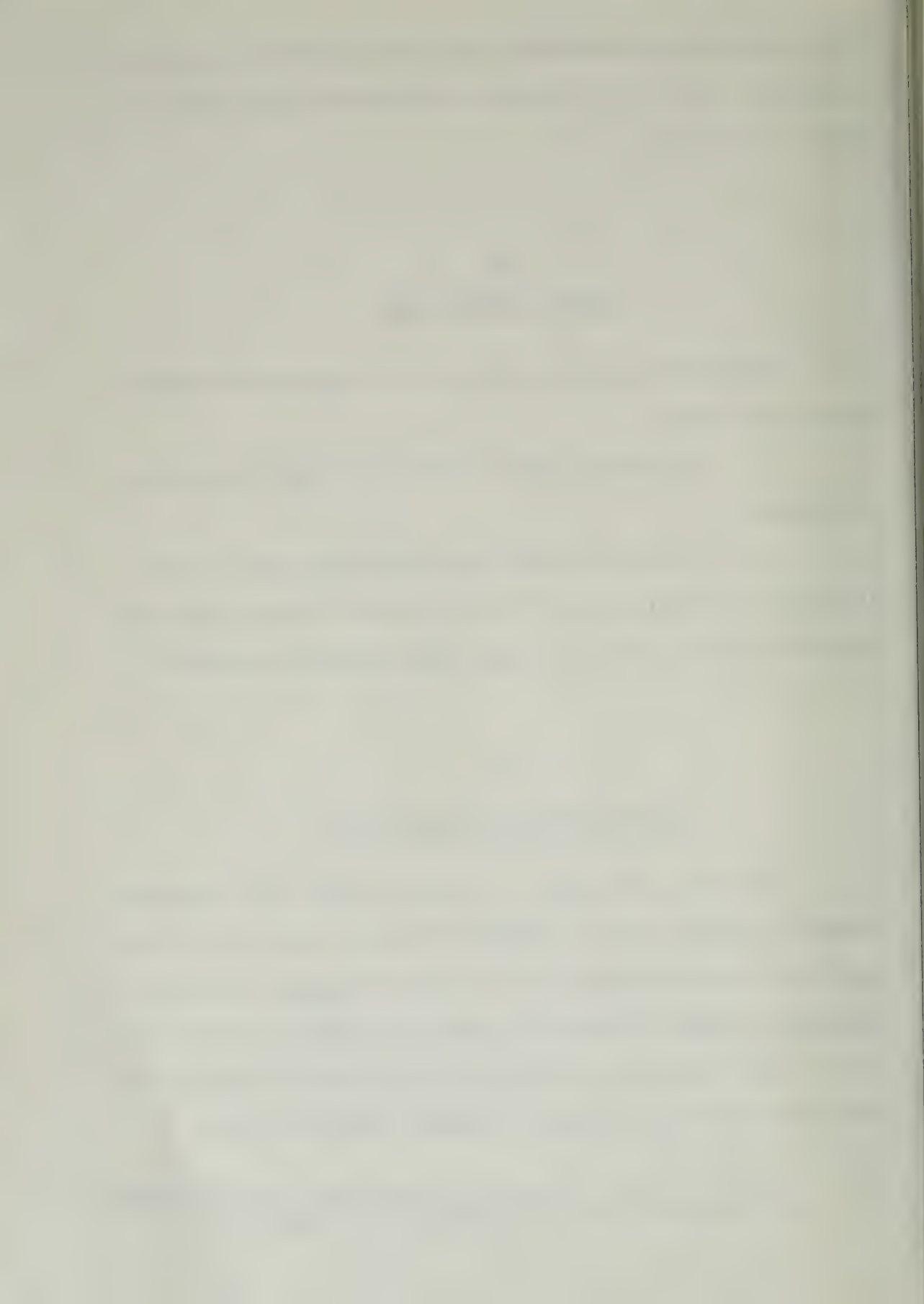
### IV

#### STATEMENT OF THE FACTS

It was stipulated that on or about April 21, 1964 (the date alleged in the indictment), appellant returned to and entered into the United States from Mexico at the port of Tecate, California, within the Southern Division of the Southern District of California, without registering with a Customs official, agent or employee at said point of entry and without surrendering the certificate

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3/ A more convenient summary of appellant's argument appears p. i, containing the topic headings of the argument.



mentioned in Section 1407 of Title 18, United States Code. [R. T. 29].

It was stipulated that appellant was a citizen of the United States at the time in question and that he entered Mexico from the United States several days before April 21, 1964, had several "fixes" in Mexico, and returned to the United States on April 21, 1964. [R. T. 27-28].

It also was stipulated that appellant would testify that he was a user of narcotics in 1961, served six months in a county jail, was released, and did not use narcotics until on or about April 21, when he had two "fixes" and then crossed the border. [R. T. 28-29].

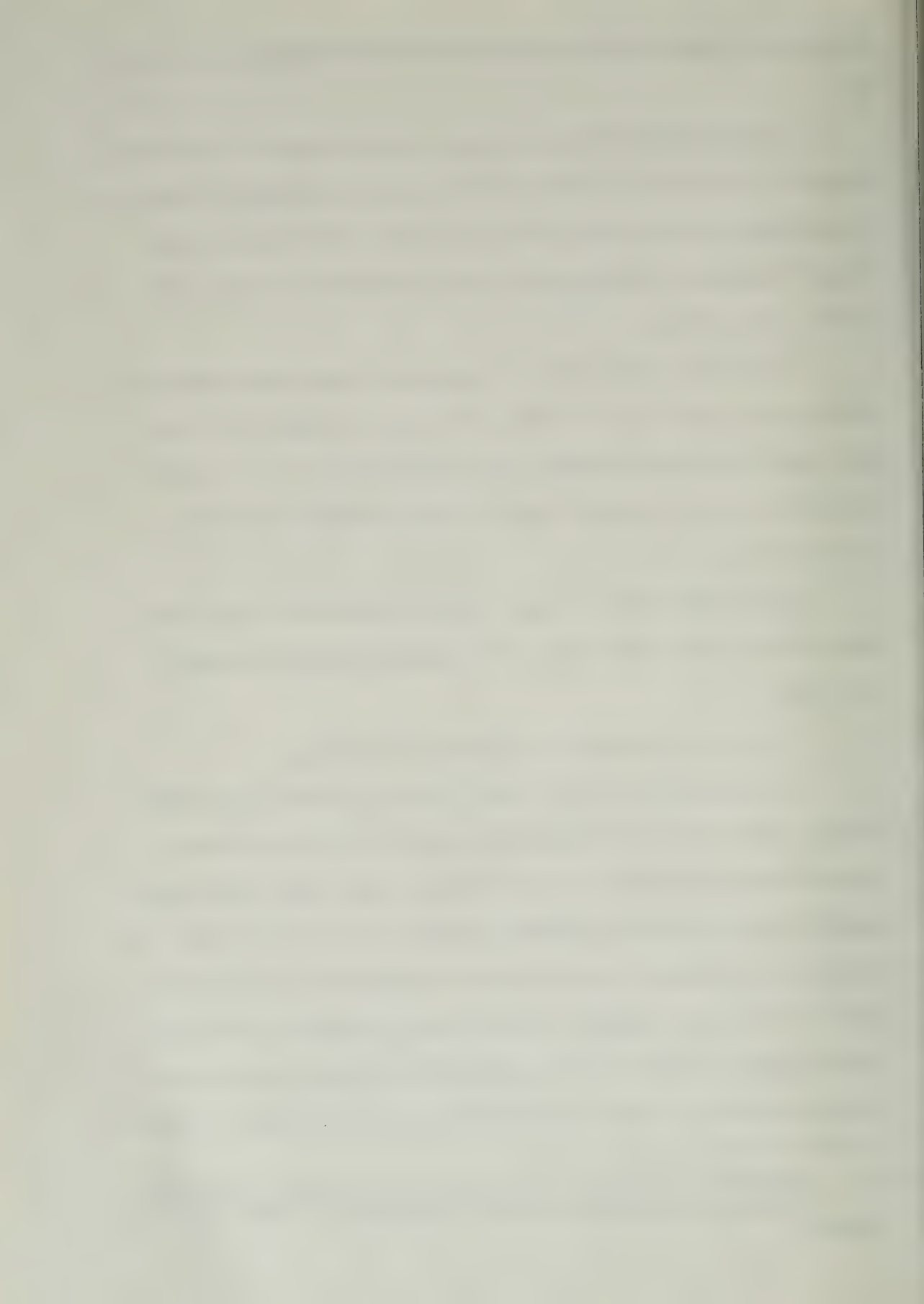
Testimony taken during a hearing in another case, the case of Sharon Jean Weissman, <sup>4/</sup> was received in evidence. [R. T. 30].

The latter testimony included the following:

Assistant District Attorney Claude B. Brown, San Diego County, testified that he had handled cases involving persons who had been apprehended at the international border and subsequently committed under California Penal Code Section 6500. He did not know whether these persons had registered at the border. [R. T. 48, 49]. He testified that the cases referred to his office involved state arrests for being under the influence of narcotics or for possession of narcotic paraphernalia. [R. T. 50]. He also

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<sup>4/</sup> Presently on appeal to this Court (No. 19974), with oral argument having been heard on October 11, 1965, in Los Angeles.



testified that "since the Van Zantin case we have had very few who have been referred from the border." <sup>5/</sup> [R. T. 50].

San Diego Deputy City Attorney William Rathje testified that he had authorized criminal complaints in cases arising at the international border at San Ysidro, but he did not know whether these cases resulted from registration under Section 1407. [R. T. 64-65].

Officer Robert L. Dodge of the San Diego Police testified that he had participated in narcotics cases which originated at the international boundary at San Ysidro, some of which involved persons who had registered under Section 1407. He testified that he received a monthly list of persons who had registered. He also testified that arrests were made only when there was reasonable cause to believe that the persons to be arrested were under the influence of narcotics at the time of the arrest. [R. T. 60, 62].

Attorney William O. Ward III testified that he had represented one Federal defendant against whom evidence had been offered concerning her registration under Title 18, Section 1407, upon another occasion. He believed that he had unsuccessfully objected upon the ground that the registration exhibit violated the Fifth Amendment to the Constitution of the United States. [R. T. 54-56].

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<sup>5/</sup> In Van Zanten v. Superior Court, 214 Cal. App. 2d 510 (1963), it was held that an alleged narcotics addict could not be committed in San Diego County under Section 6500 of the California Penal Code where the alleged addict was a resident of another county.





ARGUMENT

A.       Section 1407 of Title 18, United States  
          Code, Is Not Unconstitutionally Vague.

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Title 18, United States Code, Section 1407, requires registration by any international traveler who is a citizen of the United States and falls within one of the following classifications:

1.       One who is addicted to narcotic drugs.
2.       One who uses narcotic drugs.
3.       One who has been previously convicted of certain violations.

Appellant was charged as an addict and user but not as a previously convicted violator. He contends that the term, "uses," is unconstitutionally vague. Appellee submits that "uses" is a clear, simple term.

This is not a case of first impression. In Palma v. United States, 261 F.2d 93 (5th Cir. 1958), the defendant was charged under the same statute, Section 1407, with failing to register, being a citizen "who is addicted to and uses narcotic drugs. . . ." (at p. 94). He contended that the statute and regulations pursuant thereto did "fail to define a proper standard of guilt by being vague and indefinite . . ." (footnote at pp. 94-95).

It is clear from the appellant's brief in Palma, supra, that he raised the question of alleged vagueness of the addict and



user terms in that appeal. 6/ The court rejected appellant's contention.

In considering the validity of Section 1407, it should be noted that there is a "strong presumption of constitutionality due to an act of Congress . . . ."

United States v. Di Re, 332 U.S. 581, at 585  
(1948) (Emphasis added).

The Supreme Court has been extremely reluctant to strike down Congressional legislation during the modern era. Professor Bernard Schwartz wrote in 1957:

"In the twenty years since 1937, the Court has declared invalid only three federal statutes, and not one of these three laws was a legislative measure of great significance."

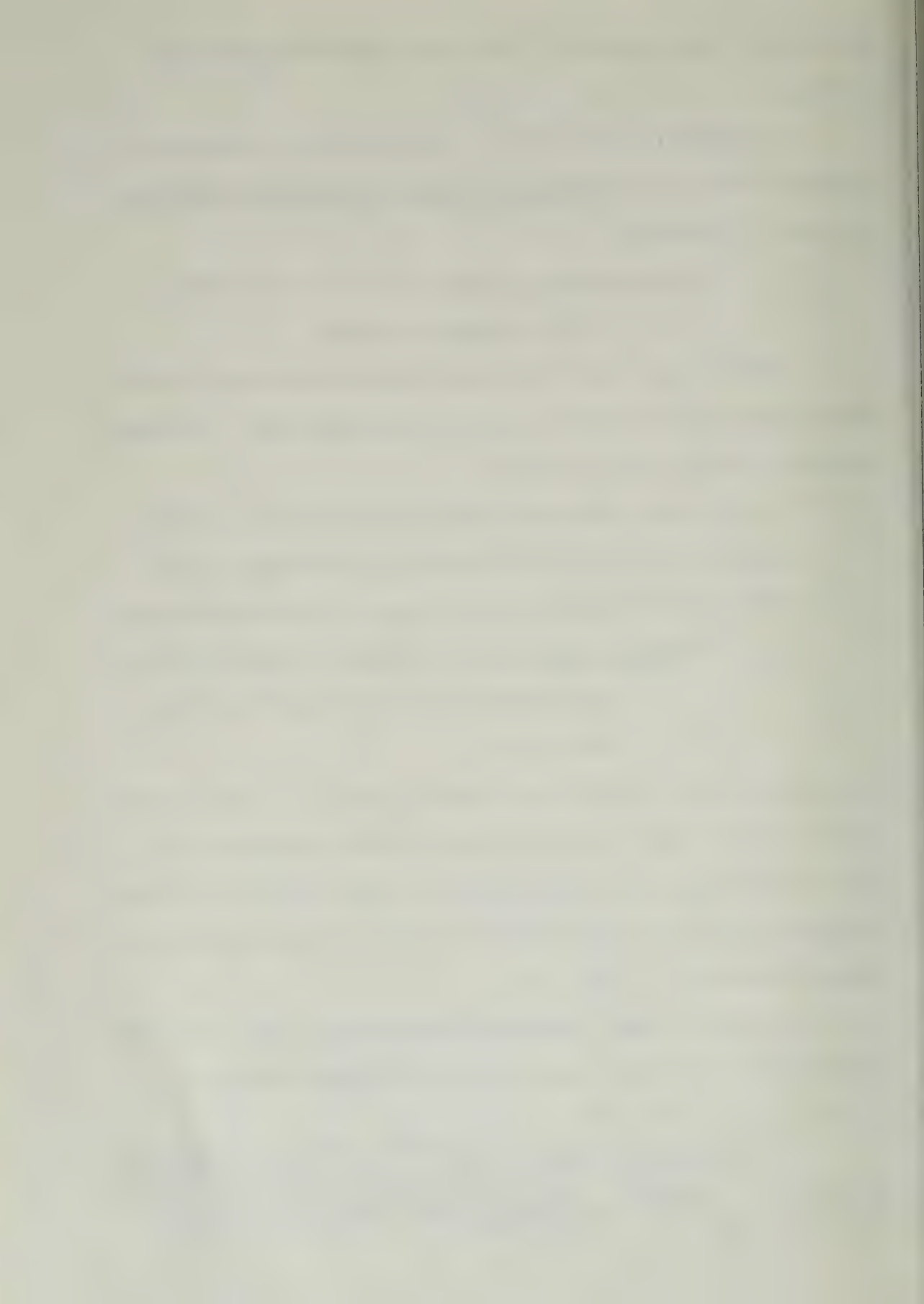
"The Supreme Court", Professor Bernard Schwartz,  
The Ronald Press Company, New York,  
1957, p. 26.

The Supreme Court, Professor Schwartz noted, "is now controlled by the conviction that it is an awesome thing to strike down an act of the elected representatives of the people, and that its power to do so should not be exercised save where the occasion is clear beyond fair debate." (Id. p. 23).

The term "uses," compares favorably with other statutory language which has been upheld by the United States Supreme

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6/ Reference may be made to appellate briefs for the purpose of determining whether a particular issue was raised upon appeal, e. g., Murphy v. Waterfront Comm'n, 378 U.S. 52, at 65-66 (1964); Karrell v. United States, 247 F.2d 706, at 709-10 (9th Cir. 1957).





Court when attacked upon the ground of unconstitutional vagueness.

A notable example is the phrase, "obscene, lewd, lascivious, filthy, indecent, or disgusting," the meaning of which could be the subject for almost endless debate. The Supreme Court held that these words are sufficiently definite.

Winters v. New York, 333 U.S. 507 (1948).

The phrase, "reasonable allowance for salaries," was held to be sufficiently definite in a prosecution for evading payment of income taxes.

United States v. Ragen, 314 U.S. 512 (1942).

A statute prohibiting "the unreasonable waste of natural gas" in an oil and gas field was held to be sufficiently definite.

Bandini Co. v. Superior Court, 284 U.S. 8 (1931).

Statutes prohibiting contracts and arrangements "reasonably calculated" to fix and regulate the prices of commodities, and prohibiting acts which "tend" to accomplish certain results, are sufficiently definite.

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86  
(1909).

The word, "offensive," would seem to vary in meaning according to the sensibilities and temperament of the listener, but a statute prohibiting "offensive" words to another in a public place was held to be sufficiently definite in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

A requirement "to do all in one's power" does not specify whether one must relentlessly devote all of his daily energy to



the goal, but it was held sufficiently definite in Miller v. Strahl, 239 U.S. 426 (1915).

Although no precise boundaries were set, a statute prohibiting the building of fires in or "near" inflammable material upon the public domain was held to be sufficiently definite.

United States v. Alford, 274 U.S. 264 (1927).

A statute referring to one who "uses" narcotic drugs is exceptionally clear and definite in comparison with the predecessor of Section 242 of Title 18, United States Code, which prohibited acts depriving any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." The quoted statute was held to be sufficiently definite for the facts of the case then before the court.

Williams v. United States, 341 U.S. 97 (1951).

That statute would include the phrase, "due process of law," which involves "no hard and fast rule," <sup>7/</sup> and it also would include the Fourth Amendment and its "quagmire of 'searches and seizures.'" <sup>8/</sup> Nevertheless, the statute was upheld.

The term, "moral turpitude," a potent subject for considerable legal, theological, and philosophical discussion, also has been held to be sufficiently definite.

Jordan v. De George, 341 U.S. 223 (1951).

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<sup>7/</sup> Brock v. North Carolina, 344 U.S. 424, at 427 (1953).

<sup>8/</sup> Davis v. United States, 327 F.2d 301, at 302 (9th Cir. 1964).



A statute prohibiting contracts and combinations unduly restricting competition or unduly obstructing the course of trade also was held to be sufficiently definite.

Nash v. United States, 229 U. S. 373 (1913).

In Jordan v. De George, supra, 341 U. S. 223, the Supreme Court faced the question whether the term, "moral turpitude," was unconstitutionally vague. The Court found that the term compared favorably with other statutory terms and phrases which had been unsuccessfully attacked in the Supreme Court, including the following (footnote at p. 231):

" 'connected with or related to the national defense,' Gorin v. United States, 312 U. S. 19 (1941); 'psychopathic personality,' Minnesota v. Probate Court, 309 U. S. 270 (1940); 'wilfully overvalues any security,' Kay v. United States, 303 U. S. 1 (1938); 'fair and open competition,' Old Dearborn Co. v. Seagram Corp., 299 U. S. 183 (1936); 'reasonable variations shall be permitted,' United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932) . . . ."

Appellant's claim of vagueness in the term, "who . . . uses narcotic drugs," appears to be based solely upon the question posed in his brief (p. 9): "Does one use qualify, or must two or more uses be established in order to require registration." Appellee submits that one use is sufficient, unless occurring in





the distant past. Had Congress intended that more than one use was necessary, it would have been simple to say so. The statute would then contain the words, "no citizen of the United States who is addicted to or uses narcotic drugs more than once. . . ."

The Supreme Court has stated:

"We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. United States v. Petrillo, 332 U.S. 1 (1947)."

Jordan v. De George, supra, 341 U.S. 223, at 231.

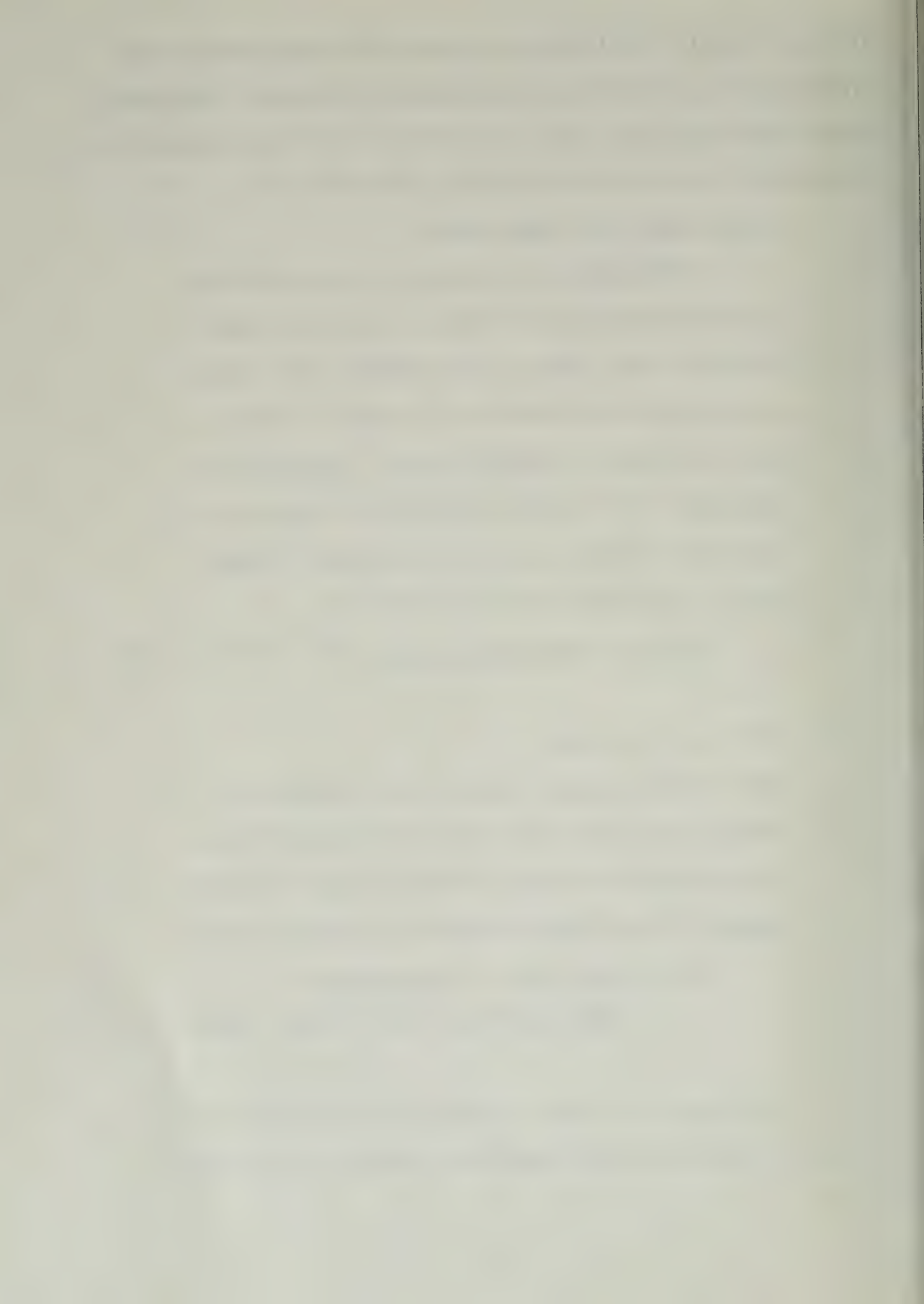
This Court has held:

"The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense."

Turf Center, Inc. v. United States,

325 F.2d 793, at 795 (9th Cir. 1963).

If Section 1407 is vague, which is not conceded, the remedy would be a construction of the statute in a reasonable



manner, rather than striking part of it from the books. 9/

United States v. Harriss, 347 U.S. 612, at 623  
(1954).

Appellant suggests that the term, "habitual," be added to the word, "uses," to provide a more definite meaning. Here again Congress could have added language to the statute had it wished to do so. The statute might then read, "no citizen of the United States who is addicted to or uses narcotic drugs habitually . . . ." However, an "addict" is defined, to appellant's satisfaction (Appellant's Opening Brief, p. 9), as "one who is addicted to a habit. . . .," one "who habitually uses any habit-forming narcotic drugs. . . .," etc.

United States v. Eramdjian, 155 F.Supp. 914,  
at 930 (S.D. Cal. 1957).

The above-quoted language contains excerpts from Judge Carter's definition of "addict" and is not complete, but enough has been quoted to point to the apparent redundancy in appellant's suggestion that "uses" be interpreted as "habitually uses," which would mean that the definitions of "addicted to" and "uses" would blend into each other until the one could not be distinguished from the other. They would have nearly identical meanings. The practical result would be the non-legislative repeal of the "uses" portion of the statute.

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9/ Appellant attacked only the "addicted" and "uses" portions of Section 1407 in the trial court, conceding that the prior conviction portion was constitutional. [R. T. 7-8].





Such a construction would seriously impair the effectiveness of the statute and limit its practical effect to previously convicted violators and those who have reached the most extreme and degraded depths of narcotics addiction. However, it has been held that in construing a statute to avoid constitutional doubts, courts "must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate."

United States v. Harriss, supra.

It is respectfully submitted that the decision of the Circuit Court of Appeals in Palma v. United States, 261 F.2d 93 (5th Cir. 1958), and the strong presumption of constitutionality of an act of Congress, should prevail over appellant's claim of unconstitutional vagueness of Section 1407.

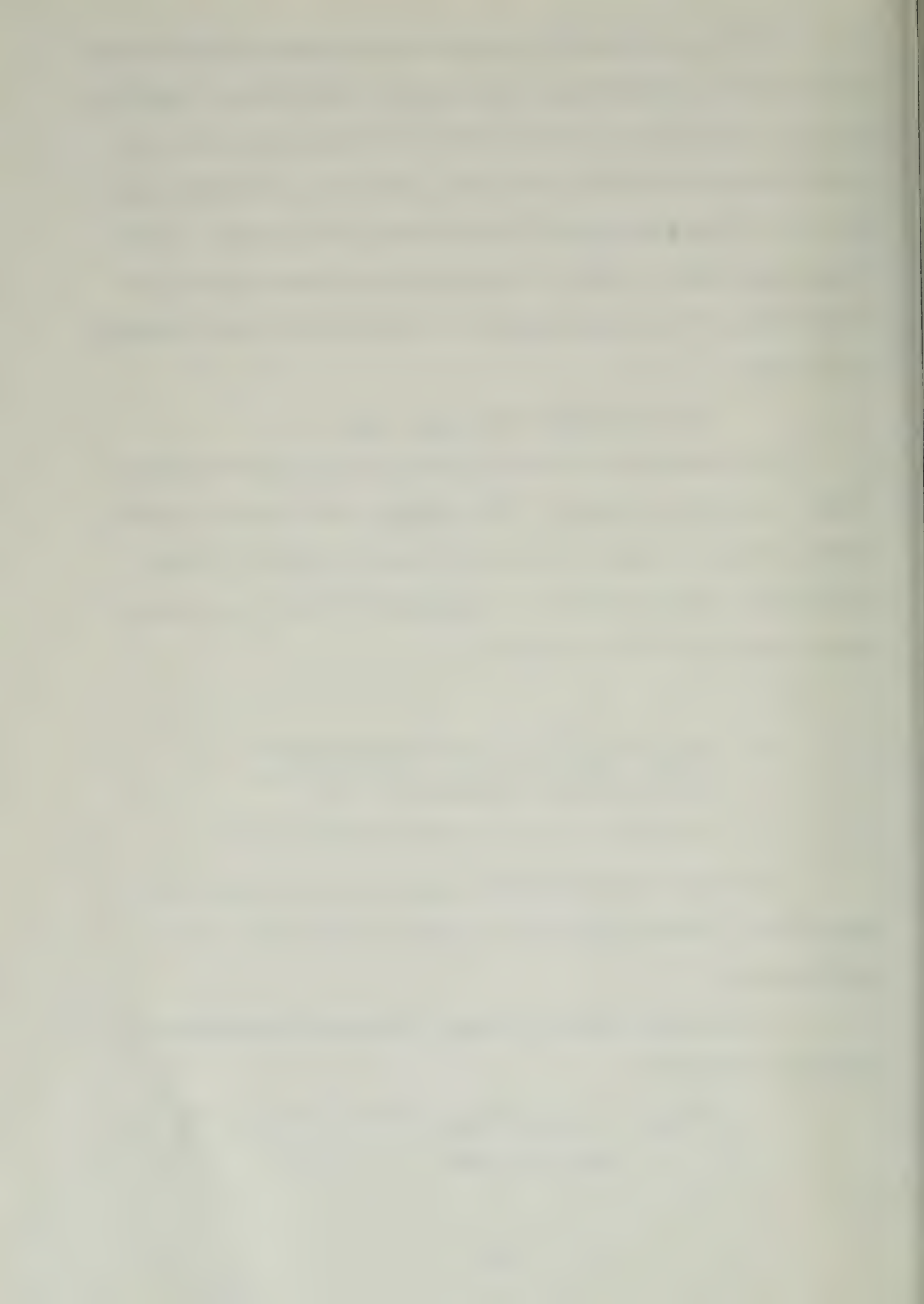
B.       Section 1407 of Title 18, United States  
          Code, Does Not Violate The Privilege  
          Against Self-Incrimination.

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Appellant contends that the registration requirement of Section 1407 violates the constitutional privilege against self-incrimination.

This question has been decided adversely to appellant's position by this Court.

Reyes v. United States, 258 F.2d 774, at 778-782  
(9th Cir. 1958).



Other courts have reached the same result upon the same question.

Palma v. United States, supra, at 95;

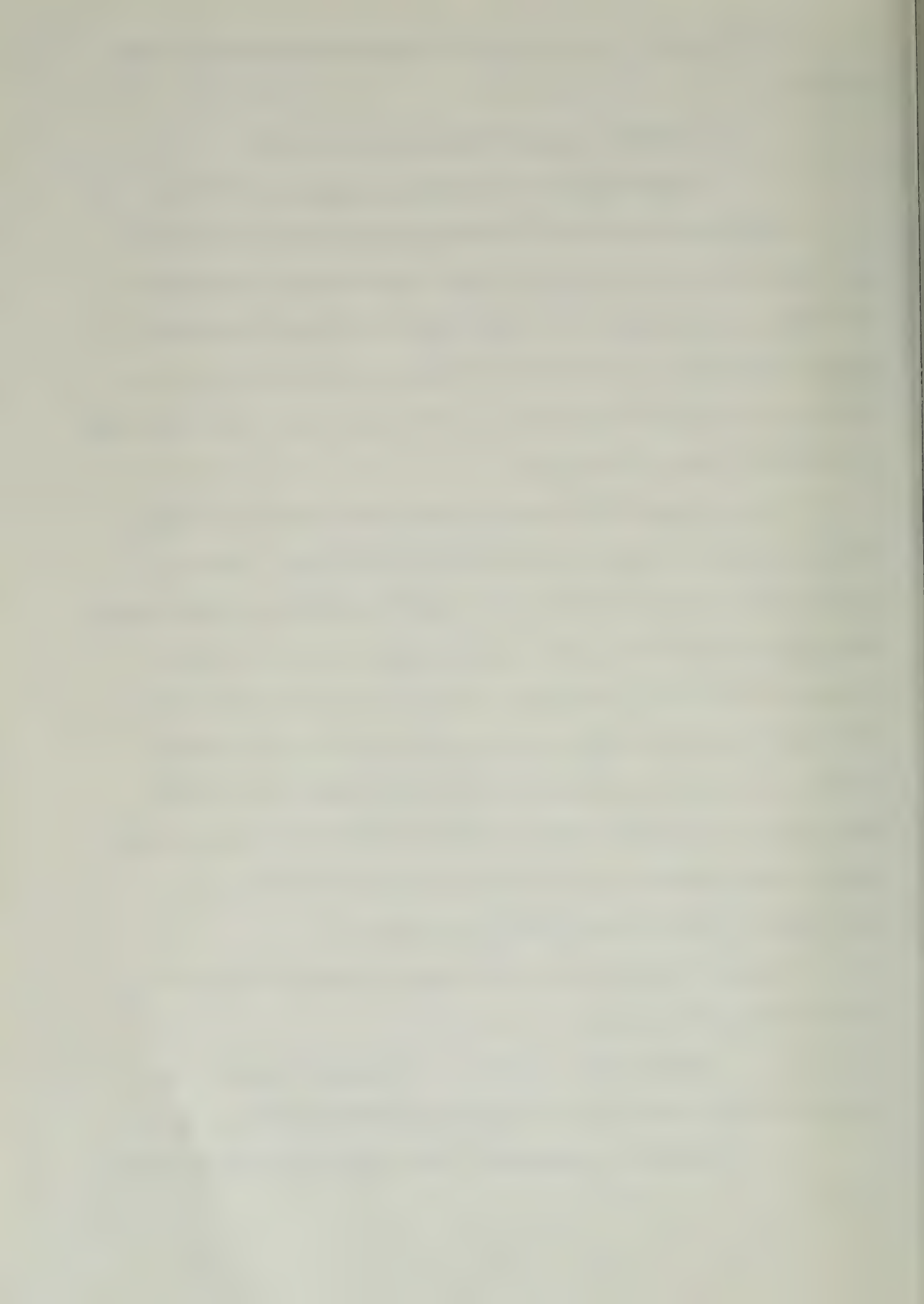
United States v. Eramdjian, supra, at 925-29.

Appellant's self-incrimination argument is based solely upon the proposition that a registrant would tend to incriminate himself under Section 11721 of the California Health and Safety Code. Under Section 11721 it is a crime to use narcotics or be under the influence of narcotics in California. It is not a California crime to be a user of narcotics.

Thus a registrant does not admit commission of a California crime. He merely states that he is an addict, user, or previously convicted violator. It is not a California crime to have the status of an addict, user, or previously convicted violator. A traveler cannot be convicted in California of use of narcotics if the use occurred in Mexico, nor can he be convicted where there is no evidence of venue. A registrant under Section 1407 need not state where or when he used narcotics. It is conceivable that he might register while refusing to reveal whether he is a user, addict, or previously convicted violator.

Appellee's position upon this issue is based upon each of the following contentions:

1. Registration involves no admission of guilt under Section 11721 of the California Health and Safety Code.
2. Assuming, arguendo, that registration under Section



1407 involves a self-incriminatory statement, the objection should be made by submitting the form and announcing a refusal to register, under the Fifth Amendment.

3. Assuming, arguendo, that registration under Section 1407 involves a self-incriminatory statement in relation to Section 11721, the objection should be made at the time of state prosecution, if any occurs, not by silently evading registration under Section 1407.

As previously noted, a registrant does not admit commission of a state crime merely by registering as an addict or user. The use may have occurred elsewhere. Appellant states: "The registration of a user or addict could conceivably establish the prima facie case for a violation of Section 11721." (Appellant's Opening Brief, p. 23). However, there is no prima facie case without proof of venue. In what county is the defendant to be prosecuted? Is it conceivable that any prosecutor would file a charge of use of narcotics without any proof of venue? The presumption is that official action is regularly performed.

Shepherd v. United States, 217 F.2d 942, at 946  
(9th Cir. 1954).

It also is presumed that the law has been obeyed.

"Jury Instructions and Forms For Federal Criminal Cases," Hon. William C. Mathes, 1961, p. 51. A prosecutor would not be obeying the law by deliberately instituting a frivolous charge.

Venue must be proved in a California criminal prosecution.





People v. Megladdery, 40 Cal. App. 2d 748,  
at 762-64 (1940);

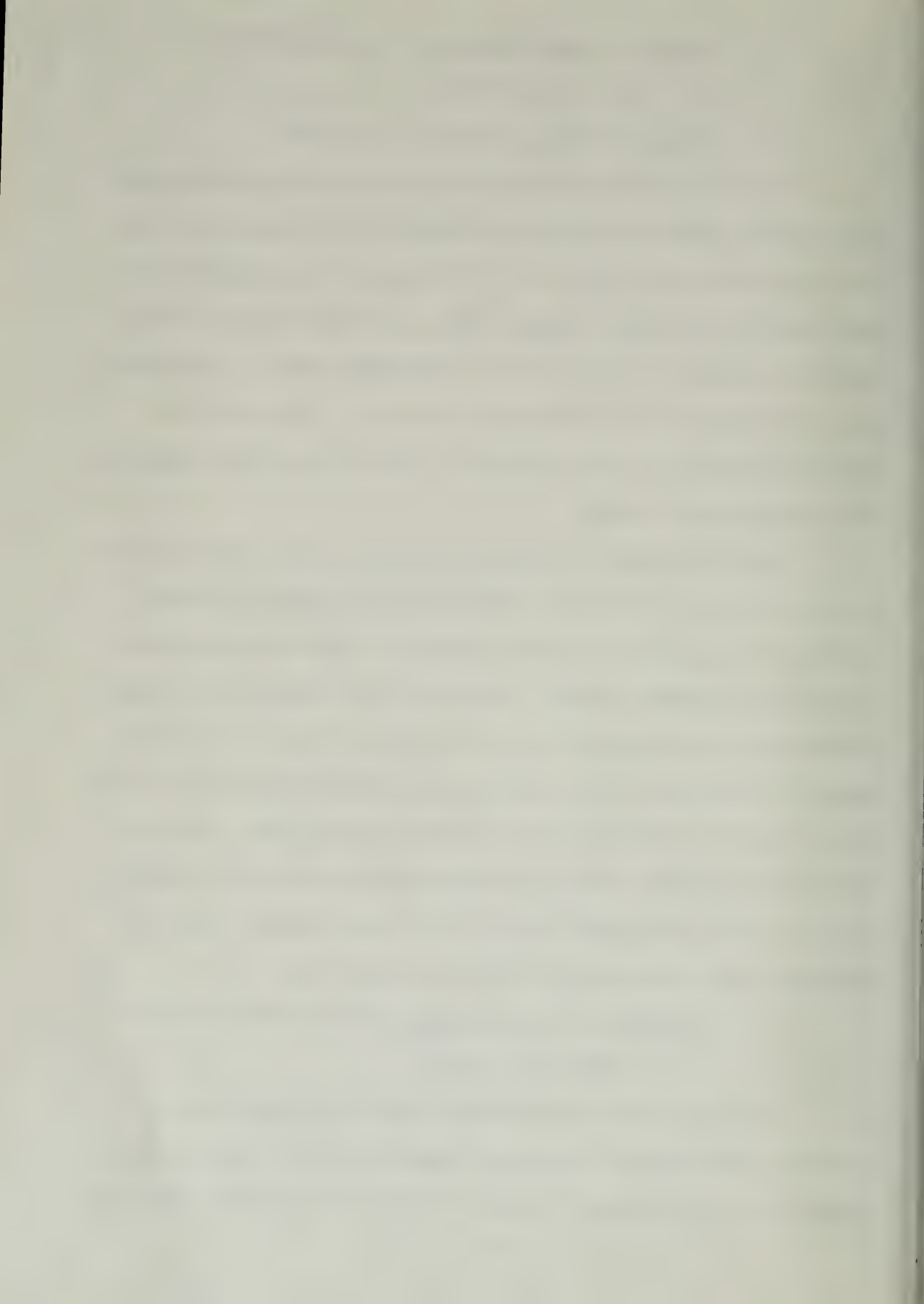
People v. Parks, 44 Cal. 105 (1872).

The United States Supreme Court has approved the English view that the self-incrimination privilege does not apply to a risk of prosecution where that risk is " 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. ' " The risk of a California prosecution with no proof of venue is such an "imaginary and unsubstantial" danger.

Appellant states, however, that registration might provide a "link in the chain" for state prosecution, apparently because evidence of registration might be offered in some future prosecution upon a separate charge. This small risk attaches to all types of documents involving entries by the public. One is required to sign an income tax return, although the signature might be a "link in the chain" in some hypothetical future forgery trial. Income tax returns are admissible in evidence against those who sign the returns, even though they are upon trial upon charges involving alleged crimes not concerned with the income tax.

Stillman v. United States, 177 F. 2d 607, at 617  
(9th Cir. 1949).

It is questionable whether the "link in the chain" rule extends to the keeping of records required by law. For example, Shapiro v. United States, 335 U.S. 1 (1947), a criminal prosecution,



the Government allegedly obtained leads against the petitioner from written records required to be kept by the petitioner under a regulation pursuant to the Price Control Act. The petitioner asserted that the self-incrimination privilege applied. The Circuit Court of Appeals ruled that the records were public documents, as to which no constitutional privilege against self-incrimination attached. This judgment was affirmed by the Supreme Court, which held (at p. 7) that "Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator." (Emphasis added).

The Supreme Court stated (at p. 22) that the very purpose of the record-keeping requirement was "to ensure that violations of the statute should not go unpunished. . . ." Although there was a strong possibility that the required records would be offered in evidence in the event of a criminal prosecution, rather than a remote possibility as in the instant case, the Supreme Court ruled that there was no violation of the Fifth Amendment.

A similar result was reached by the Supreme Court in United States v. Hoffman, 335 U.S. 77 (1948).

Appellant cites Blau v. United States, 340 U.S. 159 (1950), in support of his "link in the chain" argument. However, in Blau the petitioner "reasonably could fear that criminal charges might be brought against her" if she made certain admissions before the Grand Jury (at p. 161). Such a fear by a Section 1407 registrant





would not be reasonable.

An additional difficulty in appellant's position is the fact that this Court adopted Judge Carter's view that one who fails to register cannot later claim the privilege against self-incrimination.

Reyes v. United States, supra, at 780-82.

Appellant contends that if he had exercised his possible option of affirmatively claiming the privilege at the time that he entered the United States, "He would be forced to put the authorities on notice that he was then a user or addict."

However, this would not render Section 1407 unconstitutional. As this Court noted in Russell v. United States, 306 F.2d 402, at 409 (9th Cir. 1962), a person may be required to make an income tax return, even though answers are privileged under the Fifth Amendment. He may raise the objection in the return. This also would tend to put authorities on notice that a law has been violated, as in Reyes, supra, and as in the instant case.

In Russell, supra, this Court held that the firearm registration requirement of 26 U.S.C.A. 5841 was unconstitutional because registration admitted possession, and "proof of possession establishes prima facie, a violation of that section." (at p. 411). Under another statute, proof of possession was "'deemed sufficient evidence to authorize conviction unless the defendant explains such possession to the satisfaction of the jury.'" Russell, supra, footnote at pp. 407-08. As appellant notes in his brief (at p. 21), " . . . Russell could make no report under Section 5841 without admitting an actual or presumptive violation of the statute." A



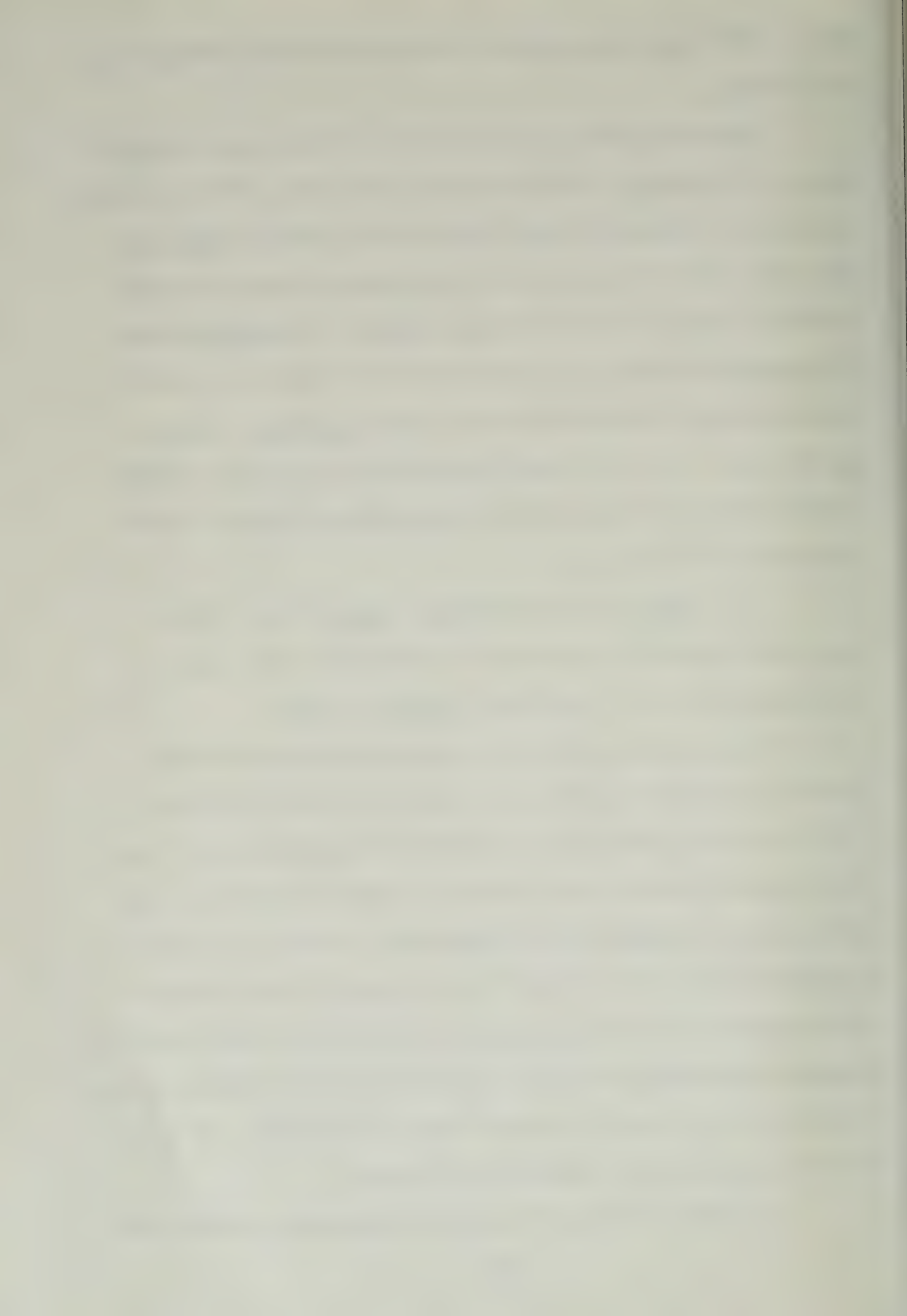
Section 1407 registrant does not face such cavalier treatment by the statutes.

Appellant states that the basis for the decision in United States v. Eramdjian, 155 F.Supp. 914 (S. D. Cal. 1957), has been weakened by a Supreme Court decision overruling the Murdock rule (284 U. S. 141), upon which the Eramdjian decision relied. However, Judge Carter's scholarly opinion in Eramdjian listed five separate reasons for rejecting the claim that Section 1407 violates the self-incrimination privilege (Eramdjian, supra, at pp. 925-28). Any one of these was sufficient to support Judge Carter's conclusion upon the Fifth Amendment question. This Court adopted all five.

Reyes v. United States, supra, at pp. 780-82. Only one of these five arguments was affected by the recent Supreme Court action overruling Murdock, supra.

Assuming, arguendo, that a Section 1407 registration involves a self-incriminatory statement in relation to Section 11721, and also assuming, for purposes of argument only, that the registrant would not be required to make the objection at the time and place designated for registration, there is no reason to consider Section 1407 to be partially unconstitutional, because the registrant would have a complete remedy at the time that the evidence was offered during the theoretical state prosecution, if it ever occurred. Then the evidence would be excluded, and there would be no violation of Constitutional rights.

In regard to this point, appellant states that Section 1407



violates the Fifth Amendment and that "The obvious solution is for Congress to enact a statute allowing the prospective registrant immunity against state prosecution based upon such registration; until such a law is passed, however, the only suitable protection against self-incrimination is to strike down any indictment for failure to register as a user or addict of narcotics." (Appellant's Opening Brief, pp. 24-25, emphasis added). However, if Section 1407 does involve self-incriminatory statements, the immunity advocated by appellant already exists, by judicial decision rather than by statute:

"Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection.

The Fifth Amendment takes care of that without a statute."

Adams v. Maryland, 347 U.S. 179, at 181 (1954)  
(emphasis added), cited with approval in  
Murphy v. Waterfront Comm'n., 378 U.S. 52,  
at 75 (1964).

In Murphy, supra, the question was "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction."

Murphy, supra, at p. 53.

The Supreme Court held that such testimony may be





compelled. (at p. 79). However, the compelled statements may not be admitted into evidence against the witness in a later criminal trial. (at p. 76). Murphy involved testimony compelled by the state. The Supreme Court ruled (at p. 79) that "the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."

If the state may compel such testimony because the witness has a non-statutory guarantee against use of the evidence against him by the Federal government, is the rule the same where the Federal government compels the statement (i. e., registration under Section 1407) and the state desires to use it in evidence at a later trial (i. e., a hypothetical California prosecution under Section 11721)?

It is clear from the opinion in Murphy, supported by the above-quoted reasoning in Adams v. Maryland, supra, that the privilege exists at the time of the subsequent criminal proceeding, should such a proceeding occur.

As the Supreme Court held in Malloy v. Hogan, 378 U.S. 1, at 11 (1964):

"It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal



or state proceeding is justified."

Consequently, appellant already has a complete protection against use of Section 1407 statements against him in a hypothetical state prosecution, in the unlikely event that use of such statements would violate his constitutional rights. Therefore, this is an additional reason for rejecting appellant's effort to strike down an act of the elected representatives of the people. It is respectfully submitted that the "strong presumption of constitutionality" (Di Re, supra, at 585) should prevail.

C. Section 1407 of Title 18, United States Code, Does Not Violate the Right to Travel.

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The mere requirement of registration does not violate the right to travel.

Reyes v. United States, supra, at 778, 782, 783.

" 'The right to travel is not an absolute one, free of all restraint or regulation.' "

Reyes, supra, footnote at 783, quoting United States v. Eramdjian, supra, at 929.

D. Section 1407 of Title 18, United States Code, Does Not Involve Cruel and Unusual Punishment.

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The registration requirement of Section 1407 does not





involve a cruel and unusual punishment. It is a reasonable and slight regulation of the right to travel. Registration by a traveler is accomplished with far greater ease than the completion of an income tax return, which also may be involuntary but could hardly be characterized as a cruel and unusual punishment.

Appellant cites Robinson v. California, 370 U.S. 660 (1962). Robinson held that addicts could not be criminally punished for the alleged offense of being addicted, which is a status rather than an act. In the same opinion it was noted (at pp. 664-65) that a state might lawfully confine narcotic addicts for treatment and impose penal sanctions for failure to comply with the procedures. If confinement of addicts does not constitute a cruel and unusual punishment, neither does the requirement of Section 1407 ordering addicts to register if they choose to engage in international travel.

## VI

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,  
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON



No. 20230

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SOLENOID DEVICES, INC., a California corporation,  
*Appellant,*

*vs.*

LEDEX, INC., an Ohio corporation,  
*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

---

## APPELLANT'S REPLY BRIEF.

---

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## APPELLANT'S REPLY BRIEF.

---

In its Answering Brief, Appellee is knocking down strawmen which have not been set up by Appellant in its brief. They are Appellee's own creations.

For example, Appellant has not asserted that the District Court's discretion to refuse to entertain declaratory relief actions has been abolished in patent cases. Appellant fully recognizes the discretionary nature of declaratory judgment relief, but has asserted that this discretion is not to be exercised arbitrarily, but in accordance with fixed principles of law. Appellant has further asserted that useful and controlling standards have been developed by the authorities for determining whether a District Court's exercise of discretion in refusing to entertain declaratory judgment suits in patent cases is reasonable and proper; and that the District Court in the

case at Bar has not exercised its discretion in accordance with such standards.

Appellee quotes on page 5 of its brief from the opinion of the Supreme Court of the United States in *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 82 S. Ct. 580, but neglected to continue with the next sentence, as follows:

“Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. ‘A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest’ (citations).” (369 U.S. 112).

Appellant recognizes the requirements for a declaratory judgment action spelled out in *Maryland Casualty Co. v. Pacific Coal and Oil Co. et al.*, 312 U.S. 270, 61 S. Ct. 510, cited by Appellee. In that case the requisite controversy *was* found to be present by the Supreme Court. Appellant has explained fully in its main brief, pages 13-24, why a genuine controversy is found in the present case. This controversy is not “technical” and unreal as Appellee suggests. The denial of patent validity by Appellant was not “routine,” but was based upon a carefully prepared report which showed that rotary solenoids claimed by the Vandewege patent had been “on sale” more than one year before the application for that patent had been filed.

Appellee asserts that in addition, it must be in the “public interest” for the Court to render the declaration sought, citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S. Ct. 1070. In that case the Supreme Court declared that it was “in the public interest that federal courts of equity should exercise



their discretionary power to grant or withhold relief *so as to avoid needless obstruction of the domestic policy of the states.*" (Emphasis Supplied—319 U.S. 298). The Supreme Court, therefore, affirmed the judgment of dismissal of the action by the lower court after trial on the merits "but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits." (319 U.S. 301).

For the District Court to entertain the present action would in no way interfere with the public interest of any state or municipal government, or of the federal government. On the contrary, it would be *in the public interest* to have stricken down as invalid the Vandewege patent so that it would "not remain in the art as a scarecrow."

See:

*Addressograph-Multigraph Corp. v. Cooper et al.*,  
156 F. 2d 483, 485 (C.C.A. 2, 1946);

*Brunswick-Balke-Collender Co. v. American B  
& B Corp.*, 150 F. 2d 69, 70 (C.C.A. 2, 1945);

*Bresnick v. United States Vitamin Corp.*, 139 F.  
2d 239, 242 (C.C.A. 2, 1943).

Further, as to where the public interest lies, it has been stated:

"\* \* \* In a patent case there are three interested parties, the patent holder, the user of an accused device and the public. The interest of the last is paramount. Devices in the public domain should not be subject to appropriation by entrepreneurs through fallacious letters patent. \* \* \*"

*Hycon Mfg. Co. v. H. Koch & Sons*, 219 F. 2d  
353 (C.A. 9, 1955).

“The public is a silent but an important party in interest in all patent litigation, \* \* \*”.

*Long v. Arkansas Foundry Co.*, 247 F. 2d 366 (C.A. 8, 1957);

*Caldwell v. Kirk Mfg. Co.*, 269 F. 2d 506 (C.A. 8, 1959).

Where, therefore, as here, the validity of Letters Patent of the United States is attacked in a declaratory judgment suit, the public interest in having such Letters Patent subjected to judicial scrutiny, and invalidated where the evidence so warrants such action, militates most strongly in favor of the District Court's entertaining jurisdiction of such a suit.

This, then, is an even further reason why the District Court in the case at Bar abused its discretion in dismissing Appellant's complaint.

The *Dr. Beck & Co. v. General Electric Co.* case, cited by Appellee and decided by the Court of Appeals for the Second Circuit (reported in 317 F. 2d 538 [C.A. 2, 1963]), illustrates the type of situation where discretion *may* be properly exercised by a District Court to refuse to entertain an action for declaratory judgment of patent invalidity. In that case there was:

(1) An issue whether anyone of the employees of the defendant patent owner who made charges of infringement against the plaintiff had “actual or apparent authority to make such a charge on behalf of defendant.” The Court found in the negative and stated:

“A charge of infringement by agents who have no authority to make it does not create a controversy.” (317 F. 2d 539).

(2) An issue as to whether plaintiff had any serious plans to engage in business in the United States, or that its plans were at all altered by the charge of infringement.

Neither of such factual circumstances was before the District Court in the case at Bar. The infringement charge and suggestion of plaintiff's need for a license under the Vandewege patent-in-suit were made by defendant's president himself; and plaintiff's business has been alleged to have been in existence and devalued by defendant's infringement charge. *The Dr. Beck & Co.* case does not, therefore, support the action of the District Court in the present case.

For the reasons stated in Appellant's main brief and hereinabove, Appellant submits that the District Court's order of dismissal should be reversed.

Dated: November 11, 1965.

Respectfully submitted,

SMYTH, ROSTON & PAVITT,  
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### **Certificate.**

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

WILLIAM H. PAVITT, JR.,





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## APPELLEE'S BRIEF.

---

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## APPELLEE'S BRIEF.

---

### A. JURISDICTIONAL STATEMENT.

The order appealed [R. 13-15] results from a challenge to the validity of Letters Patent of the United States granted under an act of Congress (Title 35 U.S.C.): The appeal thus involves subject matter over which the district courts have original jurisdiction (28 U.S.C. 1338).

The Complaint [R. 2-6] generating this appeal was in the form of a request for a declaration of rights under 28 U.S.C. 2201 and, accordingly, was an action over which the District Court, at its discretion, may or may not have accepted the jurisdiction conferred under 28 U.S.C. 1338 (*Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111).

The District Court on its own initiative and in an exercise of judicial discretion declined to accept jurisdiction of the declaratory judgment request, ordering dismissal of the action [R. 13-15]. Such dismissal being a final decision of a district court of the 9th Circuit, jurisdiction of this Court of Appeals is established by 28 U.S.C. 1291 and 1294.

## **B. STATEMENT OF THE CASE.**

As will be explained more fully in the Argument which follows, the Complaint [R. 2-6], the dismissal of which is now appealed, alleges a patent controversy of a "technical" nature. According to the complaint, there is a patent owned by appellee, appellant is a manufacturer of products which it sells, appellee has asserted that a product manufactured by appellant infringes its patent and has proposed a license agreement, appellant has advised appellee that the patent is invalid for sundry reasons recited in the Complaint, and appellee nevertheless continues to assert the validity of the patent.

The Complaint prays [R. 6] for a declaratory judgment decreeing that the patent is invalid. The District Court, exercising its discretion implicit in the word "may" (28 U.S.C. 2201), declined jurisdiction over the controversy alleged and ordered dismissal of the action [R. 13-15].

The Complainant thereafter moved [R. 16-17] for reconsideration and amendment of the dismissal order, supporting its Motion with an affidavit [R. 28-30] having annexed exhibits [R. 31-41].

A hearing on the Motion for reconsideration was granted and after such hearing a Memorandum [R.

43-47] was issued by the Court denying the Motion for reconsideration. In such Memorandum the Court denied a request, by appellant, for leave to amend the Complaint.

Appellant thereafter filed a Notice of Appeal to this court [R. 48], appealing from the Order Dismissing Action [R. 13-15] and from the court's decision and order [R. 43-47] denying appellant's Motion [R. 16-17] to reconsider and amend said Order Dismissing Action.

### **C. THE CENTRAL ISSUE INVOLVED IN THIS APPEAL.**

The preceding Jurisdictional Statement, while considered entirely accurate, states as a fact a matter placed in issue by the Appellant. Stated succinctly, the appellant's position is that the district courts have no discretion to accept or reject jurisdiction under 28 U.S.C. 2201, when the controversy sought to be adjudicated is a patent controversy not otherwise before the courts.

In contrast to appellant's contention, it is the contention of Appellee, and of the Honorable Court whose decision is appealed, that the courts have discretion to accept or reject jurisdiction over all actual or justiciable controversies sought to be adjudicated under 28 U.S.C. 2201, whether or not the controversy involves a patent.

The central issue presented by these divergent contentions is whether or not a patent controversy is, in and of itself, of such unquestionable immediacy and reality that the public interest compels an immediate declaration of rights with such force that the district courts are, as a matter of law, without discretion in the matter.

#### D. FURTHER ISSUES PRESENTED.

Should this court determine that the District Court does have discretion to accept or reject jurisdiction over actual controversies involving patents, a secondary issue presented by this appeal is whether or not the District Court properly exercised its discretion under the facts pleaded.

Should this court find an abuse of discretion, it still must be established that an actual controversy did exist such that jurisdiction could have been accepted in any event. This issue concerning the existence of an actual controversy is properly avoided if this Court should find a proper exercise of discretion by the District Court. See *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331, 82 S. Ct. 337, 342 (1961).

Should this Court find that the District Court's discretion was not properly exercised, and that an actual controversy was pleaded, remand is in order. However, should this Court find a proper exercise of discretion by the District Court, a tertiary question remains to be considered. This tertiary question, raised by appellant, is whether or not the District Court erred in refusing a request by appellant for leave to amend its complaint so as to state a controversy "more to the District Court's liking" (Appellant's brief, part C. p. 5).

## E. ARGUMENT.

### 1. The District Court's Discretion to Refuse to Entertain Declaratory Relief Actions Has Not Been Abolished in Patent Cases.

There can be no responsible dispute concerning the District Court's discretionary authority to decline or accept jurisdiction in actions seeking declaratory adjudication under 28 U.S.C. 2201. This is recognized by the Supreme Court in *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 82 S. Ct. 580 (1962).

"The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." (369 U.S. 111, 112).

In the present appeal, appellant seeks to exclude patent controversies from this well established discretionary authority. Thus, appellant comments as follows in its brief:

- (a) P. 5, part C—"The basic question is whether the complaint avers a justiciable controversy under the Federal Declaratory Judgments Act (28 U.S.C. 2201-2202) over which the District Court *must* accept jurisdiction." (Emphasis added.)
- (b) P. 10, part B—"Discretion should not be exercised to refuse to entertain a Declaratory Judgment Action where there is an 'Actual Controversy' between a Patentee and a prospective Defendant respecting the validity, or infringement by the prospective Defendant, of a Patent."



On its face, 28 U.S.C. 2201 does not purport to exclude patent controversies. Thus 28 U.S.C. 2201 reads as follows:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

While appellant's brief cites many decisions wherein jurisdiction has been accepted for a declaration of rights in a patent controversy, not one of the cited cases suggests, when directly confronted with this issue, that, merely because the controversy is a patent controversy, discretionary authority as to an acceptance of jurisdiction is destroyed.

To the contrary, at least the Second Circuit Court of Appeals has recognized the discretionary authority vested in the District Courts as to declaratory adjudication of patent controversies. See *Dr. Beck & Co. G.M.B.H. v. General Electric Co.*, 317 F. 2d 538 (C.A. 2, 1963).

In that case, a district court of the Third Circuit had dismissed a complaint seeking declaratory adjudication of a patent controversy on the basis that no actual controversy existed. On appeal by the complainant, the Court of Appeals affirmed the dismissal, but,

seeming uncertain as to the absence of an actual controversy, supplemented its decision as follows:

“Moreover, even in actions which technically fall within the jurisdictional requirements of sec. 2201, a court in its discretion may decline to exercise jurisdiction.” (317 F. 2d 538, 539).

This is a clear recognition that even had there been an actual controversy in Dr. Beck’s complaint, the District Court still had discretion to accept or reject jurisdiction over the patent controversy.

It is submitted, therefore, that appellant’s contentions regarding the District Court’s lack of discretionary authority as to patent controversies are unsupported by the law and are, in fact, contrary to the law.

Accepting that the District Court did have discretionary authority in the present action, it remains to be considered whether the District Court reasonably exercised its discretion.

## **2. Appellant’s Controversy Is Devoid of the Reality and Immediacy Required to Give It Substance Beyond a Mere Technical Controversy.**

In the preceding statement of the case the present controversy was characterized as one of a technical nature. The term “technical” is here used to describe a controversy which does contain elements recognized as essential to establish the actual controversy required in 28 U.S.C. 2201, but which contains nothing more of substance.

Obviously a patent controversy cannot exist without an existing patent and a party plausibly chargeable with infringement of the patent. Where these essential elements exist, a patent owner may trigger an actual controversy satisfying the prerequisite of 28 U.S.C. 2201 by signifying that the activities of the party plausibly chargeable with infringement are deemed to be an infringement. The controversy is then joined by the mere filing of the declaratory judgment complaint.

These three elements: a patent, a plausible infringer and a charge of infringement are basic and essential requirements in all patent controversies over which jurisdiction can be accepted under 28 U.S.C. 2201. Until these three elements are all present the court is without jurisdiction and consequently without discretion to accept or decline jurisdiction.

Assuming these three essential elements to be present in the present action, the next question under consideration is: What is the nature of the Court's discretionary authority? The following partial answer to this question can be found in *Maryland Casualty Co. v. Pacific Coal and Oil Co., et al.*, 312 U.S. 270, 61 S. Ct. 510 (1941).

“Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” (312 U.S. 270, 273).

To the prerequisites of “immediacy” and “reality” established in the above decision must be added a further prerequisite, namely, that it be in the “public interest” to render the declaration sought, this being recognized in *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 63 S. Ct. 1070 (1943).

It is self-evident that, if the three essential elements to a patent controversy identified above, without more, automatically provide the prerequisites of “immediacy”, “reality” and “public interest,” the district courts are without discretion under 28 U.S.C. 2201 to accept or reject actual patent controversies. In effect, then, has the case law subsequent to enactment of 28 U.S.C. 2201 (the *Beck* case excepted), rewritten that law as applied to patent controversies? It is submitted that this result is not intended either by the Congress which enacted 28 U.S.C. 2201 or by the courts.

Rather, it is submitted that the words “immediacy”, “reality” and “public interest” all have an important bearing on the court’s discretionary authority. Thus, all controversies sought to be adjudicated under 28 U.S.C. 2201 must have an “immediacy” in the sense that immediate relief appears necessary. They must have a “reality” in the sense that both the controversy and the need for immediate relief are not more imagined than real. Even when the tests of “reality” and “immediacy” are favorably met, it remains to be considered whether or not it will be in the “public interest” to adjudicate the controversy by way of the special remedy afforded by the Declaratory Judgment Act.



**3. An Abuse of Discretion by the District Court Is Not Evident From the Record and Has Not Been Shown by Appellant.**

A review of Judge Byrne's Order of Dismissal and subsequent Memorandum denying reconsideration shows that his Honor gave careful consideration to these questions of immediacy and reality and to the public interest. Thus, the court after a review of the pleadings and, later, the surrounding circumstances revealed by the appellant's exhibits, could find only a negotiation for the purchase of appellant's business assets in which the issue of patent infringement appeared to arise solely as a bargaining tool. This, the court correctly labeled a "casual business disagreement" [R. 47].

The court also noted that the controversy lacked the traditional indicia of patent disputes readily recognizable as "real" and "immediate". Thus, there was no threat conveyed to appellant's customers. Had there been such threat, appellant's sales might naturally have suffered and its business been jeopardized as a result. No such threat can be discerned in the record, however.

The court also noted that no clear threat of legal action by appellee, either now or in the future, appeared in the record. Thus, while appellee had directed attention to a particular patent, the circumstances did not appear to Judge Byrne to reveal any threat of immediate legal action and, possibly, not even a threat of future action.



In view of the circumstances of the present action Judge Byrne appears to have been entirely reasonable in concluding, as a matter of discretion, that the controversy presented to him was not of such immediacy and reality that the public interest required a declaratory adjudication.

Appellant's brief refers frequently to a "cloud" placed over its business and a diminished business value as a result of the controversy. However, appellant has failed to show any "cloud" or diminished value or other circumstance that does not flow naturally from the mere existence of a patent and a claim of infringement. The types of "injury" to which the appellant refers are inherently present in all patent controversies adjudicable under the 28 U.S.C. 2201. Since these factors are inevitably present, the courts discretionary authority must look beyond these factors, giving particular attention to circumstances which show that the controversy has extended beyond the technical or minimum elements necessary for declaratory adjudication.

In the present case there is a patent, a plausible infringer and a claim of infringement. This claim was answered in routine fashion by a denial of patent validity. With this denial only a technical controversy was joined. The complaint recites nothing further of substance.

It is submitted therefore that the record in its entirety and even the arguments presented in appellant's brief fail utterly to disclose any circumstances which

takes this action beyond the technical prerequisites for a controversy and contain nothing to show that Judge Byrne either lacked discretionary authority or, in the alternative, abused such authority.

4. **The Present Action Arises From a Casual Business Disagreement and Falls Short of Being an "Actual" Controversy as Required in 28 U.S.C. 2201.**

The District Court's dismissal order reads as follows:

"It is ordered upon the court's own initiative that this action is hereby dismissed, 'but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should (be) denied without consideration of the merits.'" [R. 14].

From the above language it may appear that no serious question as to the existence of an actual controversy exists in the present case. Thus the court's assertion of a discretionary power to decline jurisdiction implies a power to accept jurisdiction, which can exist only when an actual controversy exists.

However, a more careful reading of the dismissal order reveals a substantial doubt as to the existence of an "actual" controversy. In conclusions (5) and (6) of the dismissal order [R. 14] his Honor Judge Byrne observed that a dispute involving only patent validity did not allege a "controversy" such as contemplated by the Declaratory Judgments Act, but was rather an assertion of a mere abstract or hypothetical question.

After the hearing on the motion for reconsideration, wherein exhibits submitted by the appellant could be reviewed, Judge Byrne stated more positively that "this court is of the opinion that plaintiff alleges only a casual business disagreement between the parties, arising during the course of negotiations between the parties for the purchase by defendant of the assets of the plaintiff."

From the foregoing, it appears that Judge Byrne found, in the complaint and in the exhibits later submitted, a disagreement as to the validity of the patent which arose during negotiations for the sale of business assets, negotiations wherein the issue of validity had substance only in so far as it affected the value of the business assets involved. Judge Byrne thus concluded in his Memorandum [R. 47] that "This is not a 'definite and concrete' controversy 'touching the legal relations of parties having adverse legal interests' such as referred to by the Supreme Court in *Aetna*, supra." (Reference to *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461 (1937).)

From this conclusion, it appears that, although the complaint seeks to allege a controversy between a patent owner and a manufacturer accused of infringement, Judge Byrne has looked beyond this technical issue to find a business negotiation which is not an adversary dispute of the type referred to in the *Aetna* decision.

This finding is entirely reasonable under the circumstances of this action as revealed by the complaint and the affidavit and exhibits later submitted by appellant.

**5. Appellant Could Not Merely Amend Its Pleadings to Infuse the Controversy With the Lacking Reality and Immediacy.**

The only question remaining in this appeal is whether Judge Byrne might have erred in denying appellant's request for leave to amend its complaint to recite a controversy "more to the court's liking" (Appellant's brief, Part C, p. 5). As to this matter, appellant must be presumed to have urged all facts available to it in its complaint and in support of its motion for reconsideration. Should this not be the case, appellant is indulging in piece-meal prosecution, a practice which no court should condone. Taking the only logical position, namely, that appellant did acquaint the court with all facts and circumstances in support of its complaint at least by the end of the oral hearing on the motion for reconsideration, Judge Byrne was clearly of the opinion that no amendment within the framework of the arguments presented would provide a controversy over which he would, in his authorized discretion, accept jurisdiction.

The very act of raising this issue on appeal suggests a lack of discipline in the existing legal system. Thus the issue implies that the courts may not be capable of penetrating the verbal embellishment of a pleading to reach the substance thereof and that, in this case, an adjustment in the wording of the complaint might reveal a new substance to the controversy that the court could not discern in the pleading, exhibits and arguments before it. At best, appellant's request was only an invitation to further debate a matter already fully debated.

It is submitted that the District Court was, in view of the circumstances and the nature of the request, free of error in denying the request for leave to amend.

### Summary.

It is submitted that this Court should affirm the District Court's dismissal of the Complaint because:

1. The District Court is not forced to accept jurisdiction over all actions allegedly brought under 28 U.S.C. 2201.

2. If, after examining a Complaint, the District Court finds that the Complaint does not present a real and immediate controversy justifying resort to an immediate declaration of rights (as contemplated by 28 U.S.C. 2201) the District Court may dismiss the action at its discretion.

3. The order dismissing the Complaint and the District Court's Memorandum show that the Court below carefully considered the Complaint and found that it did not present an actual controversy of the reality and immediacy contemplated by 28 U.S.C. 2201.

4. The District Court did not abuse its discretion in dismissing the Complaint.

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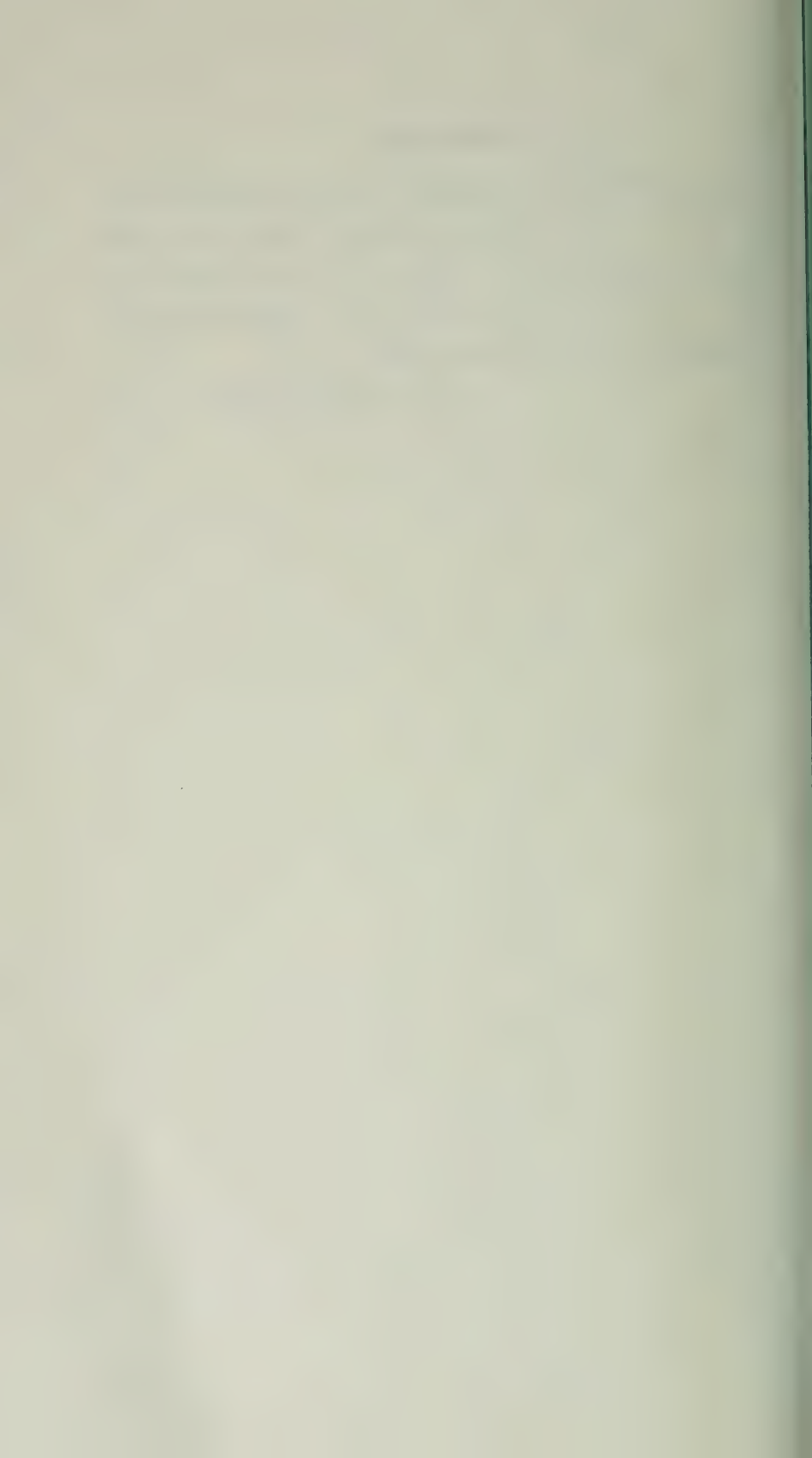




### **Certificate.**

I certify that, in connection with the preparation of this brief. I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GUY PORTER SMITH



No. 20230

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SOLENOID DEVICES, INC.,

*Appellant,*

*vs.*

LEDEX, INC.,

*Appellee.*

---

Appeals From the United States District Court for the  
Southern District of California.

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## APPELLANT'S BRIEF.

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## APPELLANT'S BRIEF.

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### A. JURISDICTIONAL STATEMENT.

Plaintiff appeals from an order of the Honorable William F. Byrne [R. 13-15], dismissing plaintiff's complaint for declaratory judgment, which order was entered on the Court's own motion before any appearance in the action by the named defendant; and further from said Court's denial [R. 43-47] of plaintiff's motion for reconsideration of such dismissal, or alternatively, for a dismissal with leave to file an amended complaint [R. 48].

The complaint averred jurisdiction of the District Court under § 2201 of the Judicial Code of the United States (Title 28, U. S. Code); that defendant owned a patent which it had asserted was infringed by cer-



tain solenoids made and sold by plaintiff and that plaintiff should take a license under said patent; that plaintiff had advised defendant that defendant's patent was invalid because the invention of the patent had been on sale more than a year before the application for the patent had been filed; but that notwithstanding such advice, defendant continued to assert its patent against plaintiff [R. 2-12].

Upon the Court's *sua sponte* dismissal before defendant's appearance in the action, plaintiff promptly moved for reconsideration of the Court's order dismissing the complaint, or alternatively, for a modification of that order to permit plaintiff to file an amended complaint [R. 16-17]. In support of its motion plaintiff filed an affidavit of counsel to which affidavit were attached certain items of correspondence which disclosed the basis for the complaint [R. 28-41], together with a memorandum discussing and applying the law to the allegations pleaded in its complaint [R. 19-26]. The Court heard oral argument on April 26, 1965 [R. 44], but on May 5, 1965 filed a memorandum of decision and order denying plaintiff's motion [R. 43-47].

Jurisdiction of this Court of Appeals over the present appeal exists by virtue of § 1291 of Title 28 of the Judicial Code of the United States. Notice of appeal was filed May 10, 1965 [R. 48].

## **B. STATEMENT OF THE CASE.**

As averred in the complaint filed herein, as supplemented by plaintiff's motion papers, plaintiff is a California corporation doing business in the Los Angeles area [R. 2]. Since the Summer of 1963, plaintiff has been engaged in designing, engineering, manufacturing

and selling electromechanical devices, among which is a certain type of rotary solenoid [R. 3]. These rotary solenoids are called PACSOL D-C torque solenoids and serve as prime energy sources where designs call for an instantaneous snap-action rotary force [p. 2 of Ex. A, R-7]. Plaintiff has manufactured and sold a number of these rotary solenoids to plaintiff's customers who have incorporated them in their own equipments for their own use and/or resale to their own customers [R. 3]. These solenoids have operated successfully in the hands of plaintiff's customers so that plaintiff has been enjoying a valuable goodwill in its business of manufacturing and selling such solenoids [R. 3].

On September 15, 1964, the patent-in-suit issued to defendant as assignee of the alleged inventor, one Orville Vandewege, on an application filed by the latter on March 30, 1959 [R. 3; Ex. B, R. 8].

Subsequent to the issue of the said patent, defendant, an Ohio corporation having a place of business in the City of Los Angeles [R. 2], asserted to plaintiff that plaintiff's said rotary solenoid infringes defendant's said Vandewege patent, that the said patent is valid, and that plaintiff should obtain a license under said patent from defendant in order to be able to continue manufacturing and selling plaintiff's said rotary solenoids [R. 3-4, Ex. A, R. 31-32].

Plaintiff has declined to take a license and asserted invalidity of the Vandewege patent on several grounds, among which is the fact, alleged by plaintiff, that the invention of the patent was "on sale" more than one year before the said March 30, 1959 filing date of the Vandewege application which resulted in the issue of the

said patent [R. 4-5]. This would render the patent invalid under § 102(b) of 35 U.S. Code [R. 4]. Defendant is charged with having known of the fact that the invention of the Vandewege patent was on sale more than one year before the filing of the Vandewege application, but notwithstanding such knowledge caused the said application to be prosecuted in the United States Patent Office to the issue of the patent in fraud of said Patent Office and of the Public of the United States [R. 5]. Notwithstanding such advice to defendant concerning the basis for plaintiff's assertion that the Vandewege patent is invalid and defendant's knowledge that the invention was so "on sale" more than one year before the filing of the application, defendant has continued to assert the validity of its said patent to the trade, and to assert to plaintiff that plaintiff's said rotary solenoid constitutes an infringement thereof to plaintiff's damage and injury, but without bringing suit against plaintiff for such alleged infringement [R. 5-6].

The affidavit of plaintiff's counsel, submitted as a part of the papers in support of the motion for reconsideration, essentially identifies certain correspondence between the parties upon the basis of which it is asserted that an actual justiciable controversy exists as to the validity of defendant's Vandewege patent; reports on a meeting between counsel for the parties in which defendant's counsel, in effect, reasserted the validity of the patent and renewed the cross-license offer; and further reports that defendant's proposed cross-license was rejected by plaintiff [R. 28-30].

### C. QUESTIONS INVOLVED IN PLAINTIFF'S APPEAL.

The questions involved in plaintiff's appeal all relate to the propriety of the *sua sponte* dismissal of the complaint by the Court below, before defendant made any appearance.

The basic question is whether the complaint avers a justiciable controversy under the Federal Declaratory Judgments Act (28 U.S.C. §§ 2201-2202) over which the District Court must accept jurisdiction.

Subsidiary questions are whether the District Court had discretion in the circumstances alleged to refuse to entertain the action, and if it did have such discretion, whether the Court abused such discretion by its order of dismissal; also whether the District Court should have granted plaintiff leave to amend its complaint to allege a controversy more to the District Court's liking.

### D. SPECIFICATION OF ERRORS RELIED UPON BY PLAINTIFF.

In prosecuting this appeal, plaintiff relies upon the following errors by the District Court:

1. In dismissing the action on its own initiative;
2. In holding that the Court had discretion to refuse to entertain the action in the circumstances alleged in the complaint;
3. In holding that the complaint does not allege a controversy as contemplated by the Declaratory Judgments Act, but is an assertion of a mere abstract or hypothetical question;



4. In holding that the allegations of the complaint show nothing more than casual disagreement between the parties, and fall far short of being a substantial controversy between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

5. To the extent that the Court does have discretion to refuse to entertain a declaratory judgment action of this character, its exercise of such discretion by dismissing the present complaint in the circumstances alleged constituted an abuse of such discretion.

6. In denying the motion for reconsideration of the Court's Order dismissing the action.

7. In dismissing the complaint without granting leave to file an amended complaint.

8. In holding the complaint must indicate the likelihood of affirmative action by defendant.

9. In holding that there is not a definite and concrete controversy touching the legal relations of parties having adverse legal interests, and

10. In exercising its discretion to deny declaratory relief on the ground that plaintiff has not been placed in such a position of insecurity as to bring it within the purpose of the relief afforded by the Declaratory Judgments Act.



E. ARGUMENT.

1. The District Court's Discretion to Refuse to Entertain a Declaratory Judgment Action Is Not Without Limitation.

While admittedly a District Court does have discretion in deciding whether or not to exercise jurisdiction in an action for declaratory relief, it has been stated that:

"\* \* \* this is a legal discretion which must not be exercised arbitrarily but rather in accordance with fixed principles of law. (Citing cases) \* \* \*".

*Crosley Corp. v. Westinghouse El. & Mfg. Co.*,  
130 F. 2d 474, 475 (C.C.A. 3, 1942).

The limitation on the District Court's "discretion" in declaratory judgment actions has been ably explained in the opinion of Judge Haney for this Court of Appeals in *Delno v. Market St. Ry. Co.*, 124 F. 2d 965 (C.C.A. 9, 1942). Although the District Court's dismissal of the declaratory judgment suit was held to be proper because certain parties having interest in the matter were not before the Court, after discussing and criticizing the use of the word "discretion" by various authorities, Judge Haney stated:

"Should declaratory relief be granted in the instant case? That question really involves two questions: (1) Is this the kind of case intended to be covered by the remedy of declaratory actions; and (2) do the facts substantiate appellant's claim to relief? The first question may be briefly referred to as the propriety of granting the relief, and the second as the merits.

“Regarding the propriety of granting the relief, the federal act merely authorizes declaration of rights and other legal relations ‘whether or not further relief is or could be prayed.’ Declaratory relief should not be refused merely because there is another adequate remedy, Federal Rules of Civil Procedure, Rule 57, available to appellant. In Bor-  
chard, *Declaratory Judgments*, 2d Ed., 299, it is said: ‘The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.’ ” (124 F. 2d 965, 968).

In *Sani-Top North American Aviation, Inc.*, 261 F. 2d 343 (C.A. 9, 1958), this Court of Appeals had occasion to consider a dismissal of a patent declaratory judgment suit by his Honor Judge Clarke in a “*per curium*” opinion by which such dismissal was reversed, and stated:

“It may be assumed that the trial court was not using the word ‘jurisdiction’ in the sense of naked power. If the case had been tried upon the complaint, one may assume that a judgment thereon would be valid against collateral attack. It may have meant that it was satisfied the case was one not meeting proper standards for a declaratory judgment suit; that is, on the basis of the statute and decisions a trial would not be properly permissible,

or it could have had in mind its discretion to hear controversies or not hear them which are implicit in the word 'may' in the federal declaratory judgments act. See 28 U.S.C.A. § 2201. This 'may' does not mean 'shall', but the discretion must be reasonably exercised. It follows the traditional equity concepts." (261 F. 2d 343, 344).

2. **The Authorities, Since the Enactment of the Federal Declaratory Judgment Act, Have Developed Useful Standards for Determining Whether a District Court's Exercise of Discretion in Refusing to Entertain a Patent Declaratory Judgment Suit Is Reasonable.**
- A. **The Court's Discretion Should Be Liberally Exercised to Effect the Purpose of the Declaratory Judgment Act.**

This statement is made in Volume 6 of *Moore's Federal Practice* (2d Ed.), at page 3030 upon the basis of the cases cited in note 11. Let us consider then the purpose of the statute as it is applicable to patent cases.

In his opinion for the Court of Appeals for the Third Circuit in *Dewey & Almy Chemical Co. v. American Anode*, 137 F. 2d 68 (C.C.A. 3, 1943), Judge Magruder statd:

"Prior to the passage of the Declaratory Judgment Act, the patentee was in a position to make oppressive use of his asserted monopoly while carefully avoiding the test of litigation with an alleged infringer. See Borchard, *Declaratory Judgments* (2d ed.) p. 803; *Treemond Co. v. Schering Corp.*, 3 Cir., 1941, 122 F.2d 702, 703, 704. Further, the

patentee might, in his own good time, sue the alleged infringer for an accounting, after large damages on account of a possible infringement had accrued. The alleged infringer could not take the initiative in litigation to challenge the validity or scope of the patent.

In providing the remedy of a declaratory judgment it was the Congressional intent 'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.' *E. Edelman & Co. v. Triple-A Specialty Co.*, 7 Cir., 1937, 88 F.2d 852, 854. This court has emphasized that the Act should have a liberal interpretation, bearing in mind its remedial character and the legislative purpose. *Alfred Hofmann, Inc., v. Knitting Machines Corp.*, 3 Cir., 1941, 123 F.2d 458, 460; *Tremond Co. v. Schering Corp.*, supra, 122 F.2d at page 703." (137 F. 2d 68, 69, 70).

**B. Discretion Should Not Be Exercised to Refuse to Entertain a Declaratory Judgment Action Where There Is an "Actual Controversy" Between a Patentee and a Prospective Defendant Respecting the Validity, or Infringement by the Prospective Defendant, of a Patent.**

For the District Court to obtain jurisdiction under the United States Constitution and the Act itself, there must, of course, be an "actual controversy".

See:

*Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227,  
57 S. Ct. 461.



What constitutes such an “actual controversy” in a patent case is discussed by Professor Moore as follows:

“\* \* \* It is apparent that a ‘case or controversy’ is presented in the traditional patent action—where the patentee sues an alleged infringer for damages, or for an injunction and incidental relief. It is equally evident that the justiciable nature of the action has not altered merely because the action is brought by the prospective defendant. The controversy is precisely the same. The action against the patentee may present itself in various forms. The party seeking the declaration of invalidity or non-infringement of defendant’s patent may have already produced the accused article; or he may only have made active preparation for such production; or he may merely have been considering the advisability of commencing production. In the last situation he probably lacks standing to sue on the theory that his interest is not sufficiently immediate or real to warrant judicial interference. A judgment rendered in such a case would be largely in the nature of an advisory decree. But where the party seeking the declaration has taken active steps toward the production of the questionable article, then his interest is a real one, and obviously adverse to that of defendant whose patent right may reasonably be interpreted to embrace such conduct. Unless such a party can secure an advance judicial determination of his rights much of the value of the declaratory judgment to this field is lost.”

6 Moore, Federal Practice (2d Ed), pp. 3117-3118.



The authorities have consistently held that there is the requisite "case or controversy" whenever a patentee in *any* way indicates to a party or the party's "customers" that the party's product or method infringes the patentee's patent.

Thus, see, for example:

*Tremond Co. v. Schering Corp.*, 122 F. 2d 702 (C.C.A. 3, 1941);

*Technical Tape v. Minnesota Mining*, 200 F. 2d 876 (C.A. 2, 1952);

*Dewey & Almy Chemical Co. v. American Anode*, 137 F. 2d 68 (C.C.A. 3, 1943) cert. den. 320 U.S. 761;

*Smith-Corona Marchant v. American Photocopy*, 215 F. Supp. 348 (S.D. N.Y. 1962);

*E. W. Bliss Company v. The Cold Metal Products Company*, 137 F. Supp. 676 (N.D. Ohio, 1955);

*Temp-Resisto Corp. v. Glott*, 18 F.R.D. 148 (D. N.J. 1955);

*Midway Knitting Mills v. Sanson Hosiery Mills*, 108 F. Supp. 5 (E.D. Pa. 1952);

*General Electric Co. v. Refrigeration Patents Corp.*, 65 F. Supp. 75 (W.D. N.Y. 1946);

*F. X. Hooper Co. v. Samuel M. Langston Co.*, 56 F. Supp. 577 (D. N.J. 1944).

**C. Discretion May Be Exercised to Refuse to Entertain a Patent Declaratory Judgment Suit Where the Subject Matter Is Being Adjudicated in Another Forum.**

Occasionally it will be found that the patentee will sue a party's customer in one District Court and this party will seek declaratory judgment in another. This type of situation obtained in *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S. Ct. 219, and caused the Supreme Court to allude to the necessity of leaving "an ample degree of discretion, appropriate for disciplined and experienced judges" to the lower courts (342 U.S. 180, 183-184).

**3. The District Court's Sua Sponte Dismissal of the Complaint in the Present Action Constituted an Abuse of Such Discretion as the Court Could Exercise in Patent Declaratory Judgment Cases.**

In the case at Bar there is no question concerning plaintiff's standing to sue. Plaintiff alleges, in effect, that it has been making and selling the rotary solenoids, described in Exhibit A to the complaint, since the Summer of 1963, and has developed a goodwill in this business [R. 3]. There is, thus, no problem about plaintiff's seeking an advisory opinion in order to embark upon some manufacturing venture. Plaintiff has a genuine business interest which it seeks to protect by obtaining a declaratory judgment concerning its right to continue the same without interference from defendant through the latter's assertion of rights under its patent.

Nor is there any equivocation in the complaint about whether plaintiff has been charged with infringement by the defendant patent owner, as there was in cases

like the *Treemond Co. v. Schering Corp.*, *supra*, p. 12, and *General Electric Co. v. Refrigeration Pats. Corp.*, *supra*, p. 12.

In its complaint plaintiff has alleged:

“8. Subsequent to the issue of said Letters Patent No. 3,148,552, defendant has asserted to plaintiff that plaintiff’s said rotary solenoid infringes said Letters Patent, that the same is valid and enforceable and that plaintiff should obtain a license under said Letters Patent in order to be able to continue manufacturing and selling its said rotary solenoid.” [R. 3-4].

Further:

“\* \* \* defendant has continued to assert the validity of said Letters Patent to plaintiff and to the trade, and continues to assert that plaintiff’s said rotary solenoid constitutes an infringement of said Letters Patent, to plaintiff’s damage and injury, but without bringing suit against plaintiff for such alleged infringement of said Letters Patent.” [R. 6].

Nor is there any question whether, as a matter of wise judicial discretion, the controversy should be left for adjudication in another forum, as in *Kerotest v. C-O-Two Mfg. Co.*, *supra*, p. 13. Defendant is here specifically alleged never to have brought any suit against plaintiff for infringement of the patent in question [R. 6].

Nor is the present a case where an attempt is being made to have plaintiff’s rights adjudicated not only in respect of defendant, but in respect of other persons not before the Court, as was the situation in *Delno v. Market St. Ry. Co.*, *supra*, p. 7. Plaintiff is alleged

to be making rotary solenoids which defendant is alleged to have charged infringes defendant's Vandewege patent [R. 3-4, 6]. Plaintiff and defendant are the only two parties concerned in this dispute concerning the validity of that patent for certain stated reasons [R. 3-6]. This is a traditional patent declaratory judgment case.

On what basis, then, has the District Court predicated its exercise of discretion not to entertain the present complaint? The District Court's remarks require careful analysis. In his Honor's original order dismissing action, Judge Byrne stated:

"(4) the claim, as alleged in the complaint, does not present the usual case involving a controversy arising out of business activities between the parties or the construction of agreements between them;

"(5) plaintiff's allegation that, "Notwithstanding plaintiff's advice to defendant concerning the basis for plaintiff's assertion that the said Letters Patent is invalid . . . defendant has continued to assert the validity of said Letters Patent," does not allege a "controversy" such as contemplated by the Declaratory Judgments Act, but is an assertion of a mere abstract or hypothetical question;

"(6) the allegations of the complaint show nothing more than casual disagreement between the parties, and fall far short of being a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment; (see *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-242;"



In denying plaintiff's motion for reconsideration his Honor further stated:

"The function of a declaratory judgment in patent cases is to allow a manufacturer to bring about a judicial determination of his right to use a certain process or produce a certain item when faced with the existence of a patent on a similar item or process, and is damaged or threatened with damage by affirmative acts of the patentee. A typical instance for the use of the Declaratory Judgment Act in patent cases is where the patentee harasses the manufacturer or his customers by circulating infringement charges throughout the trade and by threatening the manufacturer with legal action. There is a complete absence of any such activities in the instant case. Although the plaintiff and the defendant have disagreed as to the validity of the patent, there is nothing to indicate the likelihood of any affirmative action being taken by defendant. As stated in *Thermo Plastics Corp. v. International Pulverizing Corp.*, 42 F. Supp. 408, 410 (D.N.J. 1941);

'Certainly no holder of a patent should be put to the expense of defending a suit by another person or sundry persons under the Declaratory Judgment Act . . . unless that person or persons is or may be damaged by affirmative acts of the patent holder.'

"The controversy from which this action arises is shown by the correspondence between Gerald Leland, president of defendant corporation, and Milton Miner, president of Trident Industries, a corporation which owns 80% of the stock of plaintiff



corporation. (Copies of these letters were verified by the affidavit of plaintiff's attorney and were filed in support of plaintiff's motion for reconsideration of the order dismissing the complaint.) The letter dated November 5, 1964, from Leland to Miner<sup>1</sup> indicates that the claim of infringement arose during negotiations for the sale of the assets of plaintiff corporation to defendant corporation; defendant corporation was not willing to pay the price asked, partly because in its view the rotary solenoid produced by plaintiff infringed on a patent of defendant. It is true that in the same letter Leland, for the defendant, states:

'At this point, it looks as though we should discuss possible license agreements. We would be willing to negotiate a license agreement on some reasonable royalty or a cross-license . . . It would seem to me that this is almost a necessity for you in order to get Solenoid Devices into a marketable position if you do, indeed, plan to spin it off.'

This statement might be interpreted as an implicit threat of affirmative action by defendant, but in the light of the absence of more typical facts indicating the existence of a controversy—such as notice of infringement to plaintiff's customers or to

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<sup>1</sup>"That the letter of Nov. 5, 1964, constitutes the sole basis for plaintiff's allegation in its complaint that defendant has claimed infringement is indicated by plaintiff's failure to produce any other such evidence in support of his motion requesting the court to reconsider its order dismissing the action. Plaintiff has, alternatively, moved to amend the complaint to state an actual controversy, but it asks leave only to delete any language the court finds inimicable to the entertainment of the action; from the reasoning below it can be seen that plaintiff could not cure the defects of this action by deleting language from the complaint."

the trade in general—this court is of the opinion that plaintiff has shown only a casual business disagreement between the parties, arising during the course of negotiations between the parties for the purchase by defendant of the assets of the plaintiff. This is not a ‘definite and concrete’ controversy ‘touching the legal relations of parties having adverse legal interests’ such as referred to by the Supreme Court in *Aetna, supra*.

“Assuming that the dispute between the parties which gave rise to the ‘sizeable gap between (defendant’s) evaluation of Solenoid Devices, Inc. and (plaintiff’s)’ (see letter of Nov. 5, 1964) could be denominated a ‘controversy’, the court exercises its discretion to deny declaratory relief on the ground that plaintiff here has not been placed in such a position of insecurity as to bring it within the purpose of the relief afforded by the Declaratory Judgment Act.”

Plaintiff submits that the complaint does not, as the District Court first ruled, allege “a mere abstract or hypothetical question” or “nothing more than casual disagreement between the parties” which falls “far short of being a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issue of a declaratory judgment.” [R. 14]. By defendant’s unequivocal charge of infringement\*, it has placed a cloud upon plaintiff’s business

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\*In defendants’ letter, Exhibit A to the Pavitt affidavit, defendant stated:

“To summarize, it appears that there is a sizable gap between our evaluation of Solenoid Devices Inc. and yours. Unless this gap can be narrowed considerably, we are not interested in acquisition. Solenoid Devices Inc. is infringing on

of making and selling its rotary solenoids—a cloud which can affect the extent of plaintiff's continued operation of this business as well as the value of that business in any negotiation for its sale. That such a sale has been contemplated by plaintiff and that the value of plaintiff's said business is diminished at least in the eyes of defendant by its claim of infringement by plaintiff's rotary solenoid clearly appears from defendant's letter, Exhibit A [R. 31-32].

In any negotiation with others who might be interested in acquiring plaintiff's business, good business ethics require that plaintiff advise such prospective purchasers of defendant's assertion of infringement of its Vandewege patent. This has been done on one occasion since the record was made in this case. Obviously such information adversely affects the prospective purchaser's appraisal of the value of the plaintiff's business. Who wants to buy a probable patent infringement lawsuit?

With respect to Judge Byrne's supplemental reasoning quoted *supra*, pp. 16-18, to support his dismissal of the complaint, plaintiff submits that it has never been a

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claims of a patent which Ledex owns. Your patent attorney advises you that the patent can be invalidated because of the 12 month statutory bar, and we say that we have sufficient evidence to show that our filing date was well within the 12 month period. It appears to me that the burden of proof is on Solenoid Devices and that in the meantime, we own the patent and are confident of its validity.

At this point, it looks as though we should discuss possible license agreements. We would be willing to negotiate a license agreement on some reasonable royalty or a cross-license of Vandewege patent 3,148,552 in exchange for Straub patent 2,989,871. It would seem to me that this is almost a necessity for you in order to get Solenoid Devices into a marketable position if you do, indeed, plan to spin it off." [R. 31-32].

requirement to support a declaratory judgment action in a patent case, that plaintiff must aver and show harrassment of "the manufacturer or his customers by circulating infringement charges throughout the trade and by threatening the manufacturer with legal action." This type of conduct, if done with malice, constituted actionable unfair competition even before the enactment of the Federal Declaratory Judgments Act.

See, for example, the discussion in *Eldridge v. So. Handkerchief Mfg. Co.*, 23 F. Supp. 179 (W.D.S.C., 1938).

Under the Declaratory Judgment Act it is sufficient to show that the patentee has "charged" infringement by the declaratory judgment plaintiff, and, in this connection, the courts have been very liberal in finding a "charge" from various circumstances.

See:

6 *Moore's Federal Practice*, Sec. 57.20 pp. 3118-3120.

Also the cases cited *supra* page 12.

In the *Thermo Plastics Corp.* case, *supra*, p. 16, cited and quoted from in Judge Byrne's memorandum, the defendant denied by affidavits that it had charged infringement. The Court there found that defendant was only investigating, not asserting infringement of its patent. In its opinion the Court quoted from Judge Clark's opinion in *Treemond Co. v. Schering, Corp.*, *supra*, p. 12, who in turn was quoting from *Borchard, Declaratory Judgments*, 2nd Ed. 1941, p. 807; as follows:

"And yet, it seems best to limit declaratory relief for the infringer to cases in which an ad-



versary claim has been made against him, though it may, it is believed, apply to an article not yet manufactured but only about to be manufactured. This requirement present in practically all the adjudicated cases, refutes the fear that patentees might be harassed by prospective infringers and be obliged continually to defend their patents. The fact that a patentee's claim of infringement is a condition precedent of this type of action places the matter of adjudication of the patent within the control of the patentee, for, if he wishes to avoid adjudication, he can refrain from making charges of infringement. But having made the charge, he then exposes himself to adjudication. In other words, the mere existence of the patent is not a cloud on title, enabling any apprehensive manufacturer to remove it by suit. It requires an assertion of right under the patent to place the alleged infringer in gear to join issue and challenge the title. 122 F.2d 702, 706, 42 F. Supp. 410, 411."

Professor Borchard's requirement, thus quoted with approval by the Third Circuit Court of Appeals, is a far cry from what his Honor Judge Byrne appears to be imposing, and we submit erroneously, as a condition for entertaining a declaratory judgment action. True, the mere existence and ownership of a patent is not sufficient to entitle one fearful of it to sue the patent owner. But *any* charge of infringement has always been recognized as constituting a sufficient affirmative act to support an action for declaratory judgment by the person whose product or process has been charged to infringe.



See:

*Sani-Top v. North American Aviation, Inc.*,  
*supra*, p. 8;

*Treemond, Co. v. Schering Corp.*, *supra*, p. 12  
and other cases *supra*, p. 12.

Assuming, however, the Judge Byrne is correct in requiring a showing of more in the way of a threat of affirmative action by defendant to provide a basis for declaratory judgment jurisdiction, as may be seen from page 5 of the memorandum opinion [R. 47], his Honor conceded that the closing comment of defendant in its letter [Ex. A, R. 31-32] "might be interpreted as an implicit threat of affirmative action by defendant" [R. 47]. Apparently, however, the learned Judge felt that the threat should be greater and not one arising in the type of exchange between the parties which here occurred, and which his Honor labelled a "casual business disagreement between the parties, arising in the course of negotiations between the parties for the purchase by defendant of the assets of plaintiff." [R. 47].

The District Court's decision, in holding that the threat here alleged in the complaint (and supported by correspondence from defendant) is not a "definite and concrete" controversy "touching the legal relations of the parties having adverse legal interests" as are referred to in *Aetna Life Ins. Co. v. Haworth*, *supra*, p. 10, and that plaintiff "here has not been placed in such a position of insecurity as to bring it within the purpose of the relief afforded by the Declaratory Judgment Act" [R. 47], if approved by this Court, will serve to produce great uncertainty in these types of actions. This uncertainty will result in the District

Courts being burdened with motions to dismiss based upon arguments concerning the sufficiency of the defendant's threat of affirmative action against plaintiff in receipt of defendant's patent.

Since *Treemond Co. v. Schering Corp.*, *supra*, p. 12 decided by the Circuit Court of Appeals for the Third Circuit, and the numerous cases which have followed it, the law in this area has been relatively certain. Mere ownership of a patent by the defendant is no basis for a declaratory judgment suit; nor is investigation of a possible infringement. But let there occur *any* assertion, direct or indirect, by the patent owner that his patent is being infringed by a party or the party's customers in making, using or selling that party's products, and a justiciable controversy is recognized which entitled the party so charged to seek an immediate judicial determination of his liability in respect of the patent in an action for declaratory judgment.

See:

the cases cited *supra*, p. 12.

This certainty of the law has had a salutary effect among the members of the Patent Bar and the clients whom they advise. The standard advice has been: "Do not make any charge of infringement unless you are prepared to sue or be sued for declaratory judgment."

If the dismissal of the District Court in the case at Bar is sustained, this desirable certainty of the law is emasculated. Hereafter in this Circuit the Patent Bar will also be required to consider whether the patent owner is really threatening a party to the point where it appears that he is going to take affirmative action—

whatever degree of activity that may entail. However, if the patent owner is really going to sue, declaratory relief is not needed at all. The one charged with infringing simply waits until the United States Marshal appears with the summons and complaint of the patent owner.

Plaintiff submits that such a regression from the established law in patent declaratory judgment suits is not proper under the authorities, cannot be excused as a proper exercise of discretion in this type of matter, nor is warranted by any policy considerations.

Plaintiff here has had its business unequivocally threatened by defendant. Naturally, its value either to defendant or any other prospective purchaser has been diminished. Whether the infringement charge arises in the course of a business negotiation is quite immaterial.\* The effect upon plaintiff has been real, and, under the long line of authorities cited *supra*, page 12, plaintiff should be entitled to have the controversy arising from that charge adjudicated by the only Court which has jurisdiction over the same.

Plaintiff submits that, for the reasons hereinabove set forth, and upon the authorities cited and discussed, the District Court's order dismissing plaintiff's complaint should be reversed.

Dated September 10, 1965.

Respectfully submitted,

SMYTH, ROSTON & PAVITT,  
WILLIAM H. PAVITT, JR.,  
CHARLES H. SCHWARTZ,

*Attorneys for Appellant.*

---

\*See: Judge Augustus Hand's remarks in *Technical Tape Corp. v. Minnesota Mining & Manufacturing Co.*, *supra*, p. 12 at p. 878.

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM H. PAVITT, JR.





No. 20,228

United States Court of Appeals  
For the Ninth Circuit

GREAT WESTERN LAND AND DEVELOPMENT, INC., et al.,

*Appellants,*

vs.

SECURITIES AND EXCHANGE COMMISSION,

*Appellee.*

Appeal from the United States District Court  
for the District of Arizona

APPELLANTS' REPLY BRIEF

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FRANK H. SCHMID, CLERK



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No. 20,228

**United States Court of Appeals**  
**For the Ninth Circuit**

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GREAT WESTERN LAND AND DEVELOP-  
MENT, INC., et al.,

*Appellants,*

vs.

SECURITIES AND EXCHANGE COMMISSION,

*Appellee.*

**Appeal from the United States District Court**  
**for the District of Arizona**

**APPELLANTS' REPLY BRIEF**

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**INTRODUCTION**

It is rewarding to observe that, albeit appellee makes a counter statement of the case consisting of 13 pages and 14 footnotes, not one fact set forth in appellants' statement of the case has been controverted. Numerous conclusions, interpretations, additions and mis-statements have been indulged in. However, it would appear unnecessary to lengthen this reply brief by pointing out these discrepancies as they will appear obvious from the record. Furthermore, the statements have been made with utter disregard of the rule requiring the facts to be set forth most favorable to these appellants.



Appellee, for reasons which are not apparent, has made little effort to address itself to the issues or to refute the authorities presented. In the alternative, it has chosen to assert its own views as to why this appeal has been taken.

The failure to respond is a tacit admission of the correctness of the points and authorities presented and apparently a lengthy argument has been substituted with the hope that the true issues and the authorities supporting them will be overlooked. Appellants thus feel compelled to respond to the argument.

Emphasis herein will be ours unless otherwise indicated.

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## ARGUMENT

### I

THE TRIAL COURT WAS IN ERROR IN GRANTING SUMMARY JUDGMENT WHERE UNCONTROVERTED FACTS ESTABLISH APPELLANTS WERE NOT THEN USING, NOR DID THEY INTEND ANY FUTURE USE OF MAILS OR OTHER MEANS OR INSTRUMENTS OF TRANSPORTATION OR COMMUNICATION IN INTERSTATE COMMERCE IN THE MANNER COMPLAINED OF.

A. Summary judgment is improper where the undisputed material facts fail to support it.

Appellee's complaint for injunction is based upon the following material allegations:

- 1) "It appears to plaintiffs that defendants *are engaged or about to engage in acts and practices* which constitute violations of Section 5 (a) and 5(c) of the Securities Act of 1933, as amended, 15 USC 77 E (a) and 77 E (c)." (R.1 p. 1.)

- 2) That defendants “have been and *are now directly and indirectly making use* of means and instruments of transportation and communication in interstate commerce and of the mails to sell and offer to sell such securities *and causing them to be carried through the mails and in interstate commerce* by means and instruments of transportation for the purpose of sale and delivery after sale.” (R.1 p. 2.)

Notwithstanding these allegations, appellee now urges that it is entitled to injunctive relief by merely establishing “that the appellants *offered and sold* securities by means of the mails without required registration with the commission.” (AB p. 17.)\* Appellants feel this position is untenable and that this court may not grant a permanent injunction until appellee presents evidence of *present and contemplated future use* of the mails or other methods of interstate transportation, as alleged.

A review of the affidavits, relied on by the appellee, fails to disclose a single statement that the appellants, or any one of them, were *at that time using or threatening future use* of the mails or any other instruments of transportation or communication in interstate commerce.

On the other hand, the uncontroverted affidavits of Wayne H. Allen, William W. Arnett and Chester J. Peterson establish that *no such use was occurring*, that *none had taken place since the filing* of the com-

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\*AB refers to Appellee's Brief filed herein.

plaint and *that none was contemplated in the future* by any of the appellants.

“Where injunctive relief is sought because of repeated and continuous breaches of duty or violations of law, *the evidence must show that such violations, if not prevented, will occur in the future.*” (*Shore v. U.S.*, 282 F. 857.)

It will be recalled that appellants, in their Answer, denied the allegations of the complaint.

It is submitted that these denials placed upon appellee the burden of establishing the truth of the allegations before becoming entitled to a permanent injunction as a matter of law. (*Hawks v. Hamill*, 53 S.Ct 240; *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1942).)

**B. The uncontroverted facts do not establish violations of Section 5 (a) and (c) of the Securities Act.**

As appellants understand the law, it is not the issuance or sale of a security that may be enjoined, but is the future use of the mails or other means of transportation or communication in interstate commerce. (*Little v. U.S.*, 331 F.2d 287 (2nd Cir. 1964); *Harper v. U.S.*, 143 F.2d 795, 801 (8th Cir. 1944).)

The issue raised by this appeal is not the characteristics of the contracts but is whether or not the appellee has established the present or future use of the mails or other means of transportation or communication in the sale or delivery thereof. To the present moment there has been no hearing or opportunity to present evidence as to whether or not the documents

questioned by the appellee actually constitute a security under the Securities Act. As a matter of fact, Mrs. Sally E. Arie, in her affidavit, refers to "*the land which we were going to buy*", also stating she received through the mails "a description of *the land I purchased.*" Arthur H. Hutton's affidavit refers to "*sales of undivided interest in specific parcels of real property.*" (R. 3.)

Furthermore, reference to "the agreement" between Sally Arie and Neve-Allen Land & Investment, Inc. will reflect that Mrs. Arie's only expectation of profit was to come from the sale of *the land*, which she purchased, at so much *per acre*. (R. 3.)

It has long been established that the mere conveyance of a fractional interest in specific parcels of real property does not come under the regulation of the securities statute, nor is a transaction considered a security when the buyer must look "only to the thing bought" to produce a profit for himself. (*Oil Lease Service Inc. v. Stephenson*, 327 P.2d 628, 633 (Cal. 1958); *Sec. v. Bailey*, 41 F.Supp. 647 (1947); *Blackwell v. Bentson*, 203 F.2d 690, 693 (1953); *Union Land Associates v. Ussher*, 149 P.2d 568, 570 (1944).)

It will thus appear that the question of whether or not the documents used by appellants constitute a security has not been settled and remains in issue, beclouded even by the statements contained in appellee's affidavits. However, as pointed out above, appellants feel that this fact is immaterial to the primary issue as to whether or not appellants may be enjoined



from doing something which they are not now doing and which they never intend to do in the future.

Appellee, rather than meeting the points and answering the authorities set forth under heading II of the appellants' brief (Br. p. 9), engages in a diatribe which exhibits a lack of understanding or a deliberate evasion of the points raised. (AB p. 22-27.)

Appellee now asserts that the affidavits of Hutton & Ziering "were offered to show the manner in which the appellants' investment plan was set up and the extent to which appellants had actually sold fractional trust interests—subjects on which there was ample other evidence in any event." (AB p. 24.)

If this is the purpose for which the affidavits and documents were submitted they are completely contrary to the provisions of Rule 56(e) which provides "*and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*" It seems beyond question that neither Hutton nor Ziering are competent to testify as to the manner in which the appellants' investment plan was set up or as to the extent to which appellants had actually sold fractional trust interests. Their statements on these questions would be the rankest hearsay. We are unaware of the "ample other evidence" referred to.

We cannot agree that appellants by pointing out this failure to comply with the rules of court and by suggesting that the affidavits of the Aries, Goettlinger and Mattison do not show present or threatened future use of the mails, "are indulging in a meaningless quibble regarding a totally irrelevant matter."



It is appellants' belief that appellee must show the present or threatened future use of the mails or other interstate transportation in order to establish its right to an injunction and that any such use must be traced directly to the appellants and each of them.

Appellee has apparently not carefully read the authorities cited in its brief for it will be noted that in *Thomas v. U.S.*, 227 F.2d 667, 670 (CA 9, 1955), the person using the mails did so *on the instructions of those being charged* with the crime. In *Keith, Inc. v. Willingham*, 264 F.2d 76, 81 (CA 8, 1959) the payment through the mail was made *pursuant to the terms of an agreement* prepared and entered into by the parties, and in *Mansfield v. U.S.*, 155 F.2d 952, 955 (CA 5, 1946), the court pointed out it must appear the *use of the mails were necessary* in completion of the scheme in order to violate the statute and in order to charge the crime. In the last case, *Little v. U.S.*, 331 F.2d 287 (CA 8, 1964), the defendant *sent checks through his bank for clearance through another bank which necessarily caused the mails to be used*. Each of these cases draws attention to the fact that it is necessary to establish that the person being charged is the one who deputized or authorized the party using the mails so to do.

Appellee's argument shows the injustice which could be practiced upon litigants in motions for summary judgment if the rules of law are not strictly adhered to.

**C. When findings of fact and conclusions of law are made they must comply with Rule 52 of the Federal Rules of Civil Procedure.**

It is most difficult to determine whether the appellee really misunderstands, fails to read, or intentionally disregards the issues urged in Appellants' Opening Brief.

The question is not whether the District Court was forced to make findings of fact and conclusions of law, it is whether or not the findings and conclusions actually made conform to the rules of law governing them. The rule does provide for similar findings of fact and conclusions of law in granting or refusing interlocutory injunctions and the Third Circuit in the case of *Hook v. Ackerman, Inc.*, 213 F.2d 122, 1954, stated as follows:

“Rule 52(a), FRCP, requires the District Court to ‘find the facts specifically and state separately its conclusion of laws thereon in two specified situations; “in all actions tried upon the facts without a jury or with an advisory jury” and “in granting or refusing interlocutory injunctions”’. *A permanent injunction*, when issues of fact determine whether or not it should be granted, *comes within the quoted scope of Rule 52*. Generally speaking, findings of fact should be made in connection with decisions of the District Court when the decision turns upon questions of fact, as distinguished from questions of law. See Moore’s Federal Practice, Vol. 5, page 2662 et seq.”

The authorities relied upon by appellants are set forth under subheading III of the Opening Brief. They are clear, unambiguous and have not been

controverted or answered by appellee. In addition, appellee has failed to follow the requirements of Rule 18 (3) of this Court, as amended, which provides as follows:

“When findings are specified as error in the appellants’ brief, and such specification is argued therein, the *appellee’s brief shall contain record references to the evidence relied upon by the appellee as supporting the challenged finding.*”

Appellants submit that their specification of error as to the District Court’s findings of fact was properly argued in the Opening Brief and that the specified error stands admitted by appellee’s failure to comply with the provisions of Rule 18 (3) of this Court, as amended.

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## II

### THE GRANTING OF A SUMMARY JUDGMENT BY A DISTRICT COURT IS NOT A MATTER OF DISCRETION.

#### A. Introduction.

Rule 56(c) provides in part as follows:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and *that the moving party is entitled to a judgment as a matter of law.*”

As appellants understand this rule, it does not leave any discretion in the District Court in the granting of a summary judgment. Such a judgment may only be

entered when there "*is no genuine issue as to any material fact*" and when "*the moving party is entitled to a judgment as a matter of law*". With this in mind we will briefly address ourselves to the remaining subdivisions under this heading.

- B. Appellants had discontinued all of the practices objected to by appellee prior to the time appellee started its investigation and prior to the time when appellee filed its complaint herein.**

As has been pointed out, the affidavits of the appellants, taken most favorable in their behalf, clearly establish that the violations complained of by appellee had been discontinued prior to the time when Mr. Arthur H. Hutton contacted the appellants and that they were not being practiced at the time the complaint was filed. In addition, these affidavits further show that the said practices have not been entered into since the complaint was filed and that the appellants never intend to enter into such practices in the future.

Appellee expended one-third of its brief and added 8 footnotes in an attempt to indicate that the District Court had a right to disregard these uncontroverted facts, and to conclude that appellants' affiants are dishonest, perjurers who reserve the secret intent to renew their activities as soon as the preliminary injunction is no longer in effect. Appellee has also intimated that the District Court has the right under a motion for summary judgment to determine against the credibility of witnesses never seen or heard, glean presumptions from an incomplete record, construe the affidavits and pleadings in a light most favorable to



appellee and to otherwise disregard any and all rules of law or procedure which would in any way hamper its desire to obtain a permanent injunction against these apparently despised appellants.

Fortunately for appellants, such disregard of the rules of law and justice is not the normal procedure in the courts of this land as was pointed out in the case of *Fugua v. Deapo*, 34 F.R.D. 111 (1964) :

“A summary judgment should be based on *evidence which a jury would not be at liberty to disbelieve* and which requires a directed verdict for the moving party. *It is not the trial court's function to pass upon credibility in evaluating the evidentiary material* in support of and in objection to a motion for summary judgment where the issue of capability would properly be for a jury. (See Moore's Federal Prac. 2d Ed, pg 3032.)”

Appellants submit that the facts as they stand uncontroverted before the court at the present time would require a court to direct a verdict in favor of the appellants.

For this reason we submit that the summary judgment of permanent injunction was improper and that the judgment should have been for appellants.

**C. Dissolution of corporate appellants does bar injunctive relief where injunctive relief is based on activities of such corporations.**

The appellee cites numerous cases under this heading, none of which were determined by summary judgment. In reply we again draw attention to the



case of *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303, where the Supreme Court of the United States stated:

“But the *moving party must satisfy the court that relief is needed*. The necessary determination is that there exists some cognizable danger of return violation, *something more than the mere possibility* which serves to keep the case alive.”

It is appellants' position that the trial court, when faced with the uncontroverted affidavit that the appellant corporations neither own property, nor are active; that they have no separate existence apart from the corporation into which they merged; that Great Western Land & Development, Inc., although having separate corporate existence, does not have a broker's license, is not conducting any sales or promotional activities, is inactive and not intended to be reactivated; that Wayne H. Allen and E. J. Neve no longer own any interest or have any stock in said corporations and have been disassociated with them since 1962; that these individuals are not and have not been engaging in any of the complained of activities since prior to the time when appellee's complaint was filed, did not have evidence to support a finding that relief was needed or that there existed some cognizable danger of recurrent violation. In all of the cases cited by the appellee there had been a hearing where the court had seen and heard the evidence, at which time the court had the necessary information to determine the bona fides of the expressed intent to comply and to determine the effectiveness of the discontinuance.

Appellants feel that the only facts before the court at the present time conclusively establish these points in favor of the appellants and leave the trial court no discretion, particularly under the obligations placed upon the court by the provisions of Rule 56(e).

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### CONCLUSION

In conclusion appellants would point out that appellee has made no effort to answer subsection VI of the Opening Brief, pages 25 to 26, apparently conceding that the summary judgment of permanent injunction has not been drawn in conformity with the rules of 65(h) of the Rules of Civil Procedure.

Instead of answering the authorities submitted in the Opening Brief, or meeting the issues raised by appellants, appellee concludes:

“In the context of the entire record, we believe that the District Court best served the public interest by entering summary judgment of permanent injunction as to both the individuals and corporate appellants, even though the primary danger to the investing public arises from the likelihood that the individual appellants will resume their unlawful course of conduct.”

Appellants submit that it is not a question of what best serves the public interest, but it is a question of what the court should do under the uncontroverted facts and the established rules of law. Appellants feel that the record in this case establishes that the appellee has failed to present undisputed facts sup-

porting the allegations of its complaint and that the facts taken most favorable to the appellants show that the appellee is not entitled to a summary judgment of permanent injunction.

Appellants feel that the undisputed facts show that appellants are not at this time using the mails or other means of transportation in interstate commerce, nor is such use threatened in the future. Therefore, the judgment of the trial court should be reversed with instructions to grant judgment in favor of the appellants.

Dated, Phoenix, Arizona,

October 12, 1965.

Respectfully submitted,

RAWLINS, ELLIS, BURRUS & KIEWIT,

By CHESTER J. PETERSON,

*Attorneys for Appellants.*

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#### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHESTER J. PETERSON,

*Attorney for Appellants.*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 20,228

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GREAT WESTERN LAND & DEVELOPMENT, INC., ARIZONA  
SYNDICATIONS, INC., AMERICAN TRUST CO., INC.,  
NEVE ALLEN LAND & INVESTMENT, INC., MOHAVE  
INVESTMENT COMPANY, INC., ALLEN NEVE ENTERPRISES,  
INC., PYRAMID LAND, INC., TOLTEC LAND CORPORATION,  
WAYNE H. ALLEN and E. J. NEVE,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

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Appeal from the United States District Court  
for the District of Arizona

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BRIEF OF SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 20,228

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GREAT WESTERN LAND & DEVELOPMENT, INC.,  
ARIZONA SYNDICATIONS, INC., AMERICAN  
TRUST CO., INC., NEVE ALLEN LAND &  
INVESTMENT, INC., MOHAVE INVESTMENT  
COMPANY, INC., ALLEN NEVE ENTERPRISES,  
INC., PYRAMID LAND, INC., TOLTEC LAND  
CORPORATION, WAYNE H. ALLEN and E. J. NEVE,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

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Appeal from the United States District Court  
for the District of Arizona

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BRIEF OF SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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COUNTERSTATEMENT OF CASE

1. The Proceedings Below

On August 30, 1962, the Securities and Exchange Commission  
<sup>1/</sup>  
(Commission) filed its complaint (R. 1) to enjoin the appellants -

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1/ "R. \_\_" refers to numbered documents in transcript of record on  
appeal; "Br. \_\_" refers to pages in appellants' opening brief.

Great Western Land & Development, Inc. (Great Western), Arizona Syndications, Inc., American Trust Co., Inc., Neve Allen Land & Investment, Inc., Mohave Investment Company, Inc., Allen Neve Enterprises, Inc., Pyramid Land, Inc., Toltec Land Corporation, Wayne H. Allen (Allen) and E. J. Neve (Neve) - from making use of any means or instruments of interstate commerce or of the mails, in violation of Section 5(a) and (c) of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77e(a) and (c), to offer or sell, or to carry or caused to be carried for the purpose of sale or delivery after sale, certain securities, described as "investment contracts," as to which no registration statement had been filed with the Commission.

The unverified answer of the appellants (R. 4), filed September 5, 1962, admitted that they had sold the instruments described as securities in the complaint but alleged that no such sales had been made since May 1962, and that the appellants were not then engaged in or about to engage in the acts or practices constituting the violations set forth in the complaint. The answer admitted that no registration statement with respect to the instruments described in the complaint had been filed with the Commission.

A temporary restraining order as to all appellants was entered on August 30, 1962, by the Honorable Arthur M. Davis,

United States District Judge (R. 2). By stipulation of all parties (R. 6), the restraining order was continued in effect until March 2, 1964, when the Commission's motion for preliminary injunction, and the appellants' motion to quash the temporary restraining order and to dismiss for mootness, were argued before the Honorable William J. Lindberg, United States District Judge (R. <sup>2/</sup>25). The Court granted the Commission's motion for preliminary injunction as to the individual appellants Allen and Neve, and entered a preliminary injunction as to those appellants (R. 10). The Court denied the appellants' motion to dismiss for mootness (R. 10).

On March 11, 1965, the Commission filed its motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (R. 11). The Commission's motion for summary judgment was argued on March 29, 1965, before the Honorable Walter E. Craig, United States District Judge (R. 13). The Court, based upon the pleadings and affidavits and counter-affidavits filed in the action,

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<sup>2/</sup> Judge Davis died while the motions were under submission. This circumstance accounts for the long delay between entry of the restraining order and the hearing on the motions (R. 20, p. 3, fn. 2).

found that no genuine issue of any material fact existed, and entered summary judgment of permanent injunction as to all appellants (R. 13, 20, 21). The Court entered findings of fact and conclusions of law (R. 20).

## 2. The Statutes Involved

The Securities Act, 48 Stat. 74, 15 U.S.C. 77a et seq., was enacted, as stated in its full title, "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof . . . ."

Section 2(1) of the Securities Act, 15 U.S.C. 77b(1), defines a "security."

Section 5 of the Securities Act, 15 U.S.C. 77e, makes it unlawful to offer or sell securities by means of interstate media or the mails unless a registration statement with respect thereto has been filed with this Commission.

Section 20(b) of the Securities Act, 15 U.S.C. 77t(b), authorizes the Commission to seek an injunction to enjoin acts or practices which constitute a violation of the Act, and Section 22(a),



15 U.S.C. 77v(a), gives United States District Courts jurisdiction  
in such actions.<sup>3/</sup>

This Court has jurisdiction of this appeal pursuant to 28  
U.S.C. 1291.

### 3. The Substantive Facts

The individual appellants, Allen and Neve, acted as either  
president or secretary of the eight appellant corporations. Since  
about February 1958 and continuing until at least May 1962,<sup>4/</sup> Allen  
and Neve utilized these eight corporations as vehicles to acquire,  
fractionalize and sell to the investing public undivided interests  
in certain "trusts" or "syndications," which were established by  
the appellants to hold, manage, sell and convey units of land  
situated in the State of Arizona (R. 3, 11).

The investments offered and sold to public investors by the  
appellants were evidenced by a special form of "Deed and Assignment

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<sup>3/</sup> Pertinent portions of the Securities Act are set forth in the  
statutory appendix hereto, pp. A1, et seq., infra.

<sup>4/</sup> The complaint alleged sales from about February 1958 until  
August 1962 (R. 1). The answer of the appellants admitted that  
they had sold the instruments described in the complaint, but  
alleged that no sales had been made since May 1962 (R. 4).

of Beneficial Interest" (R. 3). These deeds and assignments were not in any sense outright conveyances of interests in land, but merely represented fractional interests in certain trusts established pursuant to trust agreements between the corporate appellants and a title and trust company (R. 3). The appellants created these trusts in the following manner:

One of the appellant corporations would acquire title to a tract or unit of land and thereafter convey title to a title and trust company which held the land as trustee for that corporate appellant. In total, the corporate appellants entered into about 30 of these underlying trust agreements and each corporation was the designated beneficiary of at least one trust (R. 3, 11). The trust agreements were substantially identical. By the terms of the trusts: <sup>5/</sup> (1) the trustee held title to the land for the purposes of "subdividing, platting, deeding, selling, conveying" and otherwise managing the land in accordance with instructions received from the particular corporate appellant designated as beneficiary; (2) the trustee agreed to pay to the designated corporate appellant all funds received from sale or lease of the

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5/ Copies of the trust agreements are appended to the affidavit of Arthur H. Hutton (R. 3).

property held in trust, after deducting certain specified fees, costs, expenses and advances by the trustee; (3) third parties dealing with the trustee were exonerated from questioning whether the trustee exceeded its powers in connection with the management, control, sale, disposal or otherwise handling of the land, or the application or disbursement of funds; (4) the beneficiary was bound by liens and obligations arising from management of the trust; (5) the interest of the beneficiary in the trust was described as "personal property" without any "right, title or interest" in the land held in trust and without "any right or power to apply for or secure the dissolution or termination of [the] trust or the partition or division of any of the trust property"; and (6) the trust was to terminate upon conveyance of all the property subject to trust and disbursement of all funds held by the trustee to those entitled thereto.

The appellants sold fractional interests in the trusts described above to some 250 investors residing in 22 states of the 6/ United States and Canada. As noted, the corporate appellants assigned such fractional interests to investors by a special form of "Deed and Assignment of Beneficial Interest." By the specific

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6/ Affidavit of William M. Ziering (R. 11).

terms of this deed and assignment, the investor-assignee agreed to be bound by the terms and conditions of the underlying trust agreement, and further agreed that the trustee would take all directions concerning the trust, including directions for sale of the land held in trust, from either Allen or Neve, without the necessity of the investor, as assignee of a fractional interest in the trust, joining in such directions.<sup>7/</sup> The net effect of this provision was to vest absolute and complete control of the enterprise in Allen and Neve, and to prohibit the investor-assignee from playing any role whatever in the management of the trust or disposition of the land held in trust. The investors placed their economic welfare entirely in the hands of Allen and Neve. Indeed, in many instances, the deed and assignment provided specifically that land held in trust could be conveyed by the trustee to Allen or Neve, personally, or to any corporation in which they had an interest, without the necessity of consent by the investor-assignees.<sup>8/</sup>

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<sup>7/</sup> "Deed and Assignment of Beneficial Interest" appended to affidavits of investors Sally E. Arie and George Goettlinger, and to the affidavit of Commission Staff Attorney Arthur H. Hutton (R. 3).

<sup>8/</sup> "Deed and Assignment of Beneficial Interest" appended to affidavits of George Goettlinger and Arthur H. Hutton (R. 3).



In selling fractional interests in the "trusts" or "syndications,"<sup>9/</sup> Allen and Neve entered into "collateral agreements and arrangements with investors assuring them that, within six to eight months, their individual beneficial interests would be resold by [the appellants] at a profit of 100%" (R. 20, p. 5). Allen and Neve also represented to investors that the syndicating corporations always retained a 50% interest in each underlying trust, thereby assuring investors to whom small fractional interests were sold<sup>10/</sup> that the syndications at all times retained a vital financial stake in the enterprise at least equal to the aggregate interests of investor-assignees and that the appellants would, therefore, exert considerable efforts to arrange for sale of the land held in trust at a price which would yield the promised profit. In essence, the investors, based upon these representations, were given to understand that quick and certain profits

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<sup>9/</sup> Allen and Neve at times referred to the underlying trusts as "syndications" (R. 3, 11).

<sup>10/</sup> These fractional interests were in some instances as small as 1/80th of the aggregate value of the trust (R. 11).



would be forthcoming solely as a result of management and control of the enterprise by the appellants <sup>11/</sup> (R. 3, 11).

The representations made by Allen and Neve to investors as to the certainty of doubling their investments within six to eight months were false and misleading. Some investors did not receive any return on their investment within the promised period. Other investors, after waiting from eighteen months to three years, were able to obtain the return of all or part of their original investment, without any appreciation whatever, only after instituting legal action, or threatening to expose the appellants to the Phoenix press. At least one civil action by an investor to

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11/ One investor described his conversation with Allen and Neve with respect to investing in one of appellants' "syndications" as follows:

" . . . Wayne H. Allen, at this point, interposed to say that to double your investment was almost a sure thing, which could practically be guaranteed within any six month period. It was understood during the conversation that Great Western Land and Development, Inc. would take care of everything and all I had to do was wait for a profit on my investment . . . ."

(Page 3 of affidavit of Kenneth Miller - R. 11.)

seek the return of her original investment was pending at the end of July 1962 (R. 3, 11).

Sales by the appellants produced sizeable revenues. The thirty trusts established by the appellants were of varying amounts (R. 3). The aggregate value of many of these trusts ranged between \$40,000 and \$120,000, and in many instances the cumulative amount of fractional interests sold by the appellants in particular trusts approached 100% (R. 11). The appellants adjusted the fractional interests offered to the public so as to accommodate funds available for investment.<sup>12/</sup> For example, Trust #3294, established by Allen Neve Enterprises, Inc., with an aggregate value of \$159,900, was sold to customers in fractional units ranging from 1/60th to 1/10th of the trust, and the cumulative value of fractional interests sold therein exceeded 90% (R. 11).

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<sup>12/</sup> The affidavits of investors show the varied investment program offered by the appellants. One investor purchased a 1/10th interest in one trust for \$7,425 (R. 3); another investor purchased a 1/40th interest in another trust for \$2,750 (R. 3); and another investor purchased a 1/20th interest in still another trust for \$2,820 (R. 11).

The selling activities by Allen and Neve were conducted out of the Phoenix office of Great Western. Great Western played a dual role in these sales - it was one of the syndicating corporations designated as beneficiary of some of the trusts, and also acted as broker for the sale of fractional trust interests by the other appellant corporations.<sup>13/</sup> Allen and Neve executed the instruments, on behalf of the appellant corporations, under which investments were sold to members of the public (R. 3, 11).

As discussed more fully hereinafter, the appellants made use of the mails in offering and selling their investment plan, and in delivering to investors after sale the instruments evidencing their investments (R. 3, 11).

The record does not show when the Commission began its investigation of the appellants' selling activities or when the appellants first learned that an investigation was being undertaken. The appellants admit, however, that by at least July 1962, an

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<sup>13/</sup> The Purchase Contract and Receipt appended to the affidavit of Sally E. Arie (R. 3) specifically identifies Great Western as the broker for the sale to Mrs. Arie of a 1/10th interest in a trust established by Neve Allen Land & Investment, Inc.; Allen executed the contract on behalf of Great Western and Neve on behalf of Neve Allen Land & Investment, Inc.

attorney on the Commission's staff, Arthur H. Hutton (Hutton), advised them specifically that they were offering and selling a security, without registration with the Commission, in violation of the federal securities laws (R. 4, 5).

According to the affidavit (R. 7) of William W. Arnett (Arnett), an officer of International Investments, Limited (International), all the appellant corporations, with the exception of Allen Neve Enterprises, Inc. and Great Western, have merged with International and no longer exist, and Great Western, while still maintaining its separate corporate existence, has been acquired by International, and is inactive. The affidavit of Arnett also states that Allen and Neve no longer have any connection with the merged corporations. This affidavit does not specify, nor does the record show, whether Allen or Neve have any interest in International. For reasons not shown by the record, the appellant Allen Neve Enterprises, Inc. was not acquired by International. The appellants have presented no evidence to show that this corporation is presently defunct or inactive.

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14/ The affidavit of Arnett (R. 7), dated February 25, 1964, states that he is president of Great Western, and that he had been affiliated with and has knowledge of the other appellant corporations with the exception of Allen Neve Enterprises, Inc.

(Footnote Continued)



QUESTION PRESENTED

In the opinion of the Commission, appellee herein, the only meaningful issue before this Court on appeal is: Whether the District Court abused its discretion either (1) in granting summary judgment to the Commission on the ground that there was no genuine issue as to any of the facts which were material to establishing that appellants violated Section 5(a) and (c) of the Securities Act; or (2) in determining that the public interest required that the appellants be permanently enjoined because of the likelihood of future violations, notwithstanding self-serving declarations by the appellants that they have ceased and will not resume their unlawful activities.

SUMMARY OF ARGUMENT

The investment plan which was publicly offered and sold by appellants constituted a security within the meaning of Section 2(1) of the Securities Act. The District Court did not abuse its discretion in granting summary judgment to the Commission as the

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14/ (Footnote Continued)

Accordingly, Arnett's claim that the corporate appellants are now inactive, and that Allen and Neve have dissociated themselves therefrom, would not extend to Allen Neve Enterprises, Inc.



uncontroverted facts established that the appellants offered and sold their investment plan, without required registration with the Commission, by use of the mails. The contention of the appellants that they were not responsible for use of the mails is contrary to the record. Moreover, the Commission is not required to show that the appellants themselves used the mails, but is merely required to show, as it did here, that the mails were used by investors or others who were involved in appellants' offering of securities to the investing public.

The findings of fact and conclusions of law entered by the District Court conformed precisely to Rule 52 of the Federal Rules of Civil Procedure even though, contrary to the contention of the appellants, the Court was not required to conform its findings to that Rule.

The proper test for issuance of a statutory injunction is whether past violations and other pertinent circumstances indicate a reasonable likelihood of future violations of the statute. It has been held consistently that the fact that violators discontinue their illegal activities at or about the time the Commission commences an investigation, as did the appellants here, does not bar injunctive relief. Nor does dissolution or inactivation of certain corporate appellants, subsequent to the violations, bar

injunctive relief even as to those appellants. Accordingly, the District Court did not abuse its discretion in entering a permanent injunction against all the appellants and rejecting their self-serving declarations that they would not resume their unlawful conduct, as past violations and other evidence in the record indicated that cessation of unlawful sales could be assured for only so long as the injunction was in effect.

#### ARGUMENT

- I. THE TRIAL COURT WAS CORRECT IN GRANTING THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT IN VIEW OF THE UNCONTROVERTED FACTS ESTABLISHING THAT THE APPELLANTS MADE USE OF THE MAILS IN OFFERING AND SELLING UNREGISTERED SECURITIES IN VIOLATION OF SECTION 5(a) AND (c) OF THE SECURITIES ACT.

- A. Summary Judgment is a Proper Means of Enjoining Violations of the Securities Laws Where, As Here, No Genuine Issue of Material Fact Exists.

The purpose of summary judgment under Rule 56 of the Federal Rules of Civil Procedure is to avoid useless trials and to "dispose of cases where there is no genuine issue of fact." Koepke v. Fontecchio, 177 F. 2d 125, 127 (C.A. 9, 1949). Accordingly, where material facts are uncontroverted and the Commission is entitled to relief as a matter of law, summary judgment is a proper means of enjoining violations of the federal securities laws. Securities and Exchange Commission v. Searchlight Consol. Mining & Milling Co.,

112 F. Supp. 726 (D. Nev., 1953); Securities and Exchange Commission v. Payne, 35 F. Supp. 873 (S.D. N.Y., 1940); Securities and Exchange Commission v. Larson, (E.D. Mich., 1941) 4 F.R. Serv. 36a.54, Case 1, p. 565; 6 Moore, Federal Practice (2d ed., 1953) par. 56.17[54], p. 2260.

The material facts in this action are uncontroverted. The Commission based its motion for summary judgment upon affidavits from investors, members of its staff, and others, which, together with the pleadings, established beyond question that the appellants offered and sold securities by means of the mails without required registration with the Commission. It is highly relevant that the appellants did not submit affidavits disputing or denying the facts set forth in the Commission's affidavits. In fact, the two affidavits submitted by them were limited to declarations that they made no sales since May 1962, that they did not intend to resume their selling activities, and that certain of the appellant corporations are now defunct.

Apparently, the appellants likewise agree that no genuine issue of material fact exists. Although they did not move for summary judgment in the proceedings below, they now ask this Court to grant them such relief (Br. 23-25).

B. The Uncontroverted Facts Establish Violations of Section 5(a) and (c) of the Securities Act.

The appellants make no serious contention that the investment plan which they were offering and selling to the public was not a security. Indeed, such a contention could not be reconciled with the uncontroverted facts in view of the definition of the term "security" as set forth in the Securities Act. Section 2(1) of the Act broadly defines the term "security" to encompass not only the more commonly recognized interests acquired for investment or traded for speculation, such as stocks and bonds, but also others of more variable character such as a "certificate of interest or participation in any profit-sharing agreement," a "collateral-trust certificate," an "investment contract," and "any interest or instrument commonly known as a 'security,'" and finally "any certificate of interest or participation in . . . any of the foregoing." The Supreme Court has made it clear that the term "security" as thus defined is to be given a broad and viable construction. Securities and Exchange Commission v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943); Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946).



Mr. Justice Jackson in Joiner pointed out the wide coverage intended by Congress in subjecting securities to the requirement of full disclosure (320 U.S. at 351):

"[T]he reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a "security"'."

Mr. Justice Jackson also stated that in determining whether a security is being offered, the test is (320 U.S. at 352-353):

". . . what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be."



Applying the foregoing principles, the Supreme Court in Howey held that sales of units of a citrus grove development coupled with management contracts were "investment contracts" (328 U.S. at 299). The Court defined the term "investment contract" as follows (328 U.S. at 298-299):

" . . . an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."

This Court likewise has held consistently that an investment contract exists under the Securities Act when investors invest funds in a common enterprise and look solely to the promoters thereof to make their investments profitable. Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, 285 F. 2d 162, 168, 172 (C.A. 9, 1960), cert. denied, 366 U.S. 919 (1961); Penfield Co. of California v. Securities and Exchange Commission, 143 F. 2d 746, 750-751 (C.A. 9, 1944), cert. denied, 323 U.S. 768; Atherton v. United States, 128 F. 2d 463, 465 (C.A. 9, 1942).

The evidence before the District Court establishes that, measured by any judicially approved standard (cf. D. H. Roe v. United States, 287 F. 2d 435 (C.A. 5, 1961), cert. denied, 368 U.S. 824), the instruments issued by the appellants are "investment contracts" within the meaning of Section 2(1) of the Securities Act. The economic welfare of the assignees of fractional interests in the various trusts sold by the appellants was inextricably interwoven among themselves and with the appellants in a single community of interest.<sup>15/</sup> The investor-assignees were prohibited from exercising any control whatever over management of the trusts or disposition of the underlying units of land held by the trusts. Accordingly, since appellants were offering and selling "investment contracts," which are defined specifically as securities by Section 2(1) of the Securities Act, the investors were entitled to the protection afforded by the Act through registration of these securities, and the ensuing full disclosure required by law.

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<sup>15/</sup> In the language of the trial court's findings (R. 20, p. 7):

"The trust agreement is so drafted that it is difficult to envision additional provisions that would more effectively group the assignee investors into a single community interest among themselves and with the [appellants]."

The answer filed by the appellants admits that no registration statement has been filed with the Commission (R. 4). They do not contend that they were entitled to any exemption from registration nor did they even submit evidence to the District Court showing that any exemption was available. Exemptions from registration are strictly construed against claimants who must carry the burden of establishing that they are entitled thereto.

Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Securities and Exchange Commission v. Sunbeam Gold Mines Co., 95 F. 2d 699, 701 (C.A. 9, 1938); Securities and Exchange Commission v. Culpepper, 270 F. 2d 241, 246 (C.A. 2, 1959).

The appellants devote a major portion of their argument (Br. 9-15) to a technical, and we believe futile, attack upon the types of proofs which the Commission submitted in its supporting affidavits covering two issues concerning which there is really no dispute. Thus they attack affidavits of investors and of the trust officer of the trust company which served as trustee of the appellants' investment plan as not showing "any use of the mails . . . by any of the appellants" (Br. 11). They also attack the affidavits of two Commission staff members, Hutton and Ziering, which affidavits did little more than identify photostatic and certified copies of certain documents which were attached thereto.

As to the former, the appellants are indulging in a meaningless quibble regarding a totally irrelevant matter. The Commission is not required to show that the appellants themselves used the mails, but merely that the mails were used by investors or any one else incidental to the illegal transactions, regardless of whether such persons were deputized or authorized by the appellants to act on their behalf. <sup>16/</sup> Thomas v. United States, 227 F. 2d 667, 670 (C.A. 9, 1955), cert. denied, 350 U.S. 911; Creswell-Keith, Inc. v. Willingham, 264 F. 2d 76, 81 (C.A. 8, 1959); Mansfield v. United States, 155 F. 2d 952, 955 (C.A. 5, 1946), cert. denied, 329 U.S. 792. Cf. Little v. United States, 331 F. 2d 287 (C.A. 8, 1964), cert. denied, 379 U.S. 834. In any event, aside from an unsworn initial answer, the appellants made no

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16/ Even though this is clearly so, the appellants' attempt to disown Joseph Allen, the uncle of appellant Allen, in his use of the mails as a representative of appellant Great Western in soliciting investor participation in the investment plan (Br. 11-12), is ludicrous. On two occasions the uncle accompanied the investor to the business offices of Great Western where he, together with the appellants Allen and Neve, engaged in joint effort to sell the investor (Affidavit of Kenneth Miller - R. 11).



serious attempt below to controvert the fact that the mails were used and the District Court found as a fact that the appellants "sold interests in the investment plan . . . to some 250 investors residing in 22 states of the United States and Canada" (R. 20, p. 7). How they could do this without using the mails or interstate facilities is totally incomprehensible.

As to the attack on the Hutton and Ziering affidavits and attached documents, these were offered to show the manner in which the appellants' investment plan was set up and the extent to which appellants had actually sold fractional trust interests - subjects on which there was ample other evidence in any event. As to the documents in particular, they were photostatic copies made from the files of the trust company, and from the records of a superior court of the State of Arizona and certified to as such by the clerk of the court. It borders on the frivolous to attack the use of these documents as a part of the plaintiff's case when the appellants made no attack whatever upon the authenticity of the documents or upon the oath or certification which identified them as true and correct copies of the originals.



C. The Appellants' Contention that the District Court's Findings of Fact and Conclusions of Law do not Comply with Rule 52 of the Federal Rules of Civil Procedure is Clearly Erroneous

The appellants contend (Br. 16-18) that the findings of fact and conclusions of law entered by the District Court (R. 20) fail to comply with that portion of Rule 52 of the Federal Rules of Civil Procedure which provides that in all actions tried without a jury "the court shall find the facts specially and state separately its <sup>17/</sup> conclusions of law thereon."

The appellants have apparently overlooked the fact that Rule 52 provides specifically that findings of fact and conclusions of law as required thereunder are not necessary in deciding motions for summary judgment. A District Court may grant summary judgment without entering any findings whatever, Lindsey v. Leavy, 149 F. 2d 899, 902 (C.A. 9, 1945), cert. denied, 326 U.S. 783 (1946); or the

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<sup>17/</sup> The appellants also contend that the Court's findings are not supported by the record (Br. 17). Comparison of the Court's findings (R. 20) with the statement of facts herein, pp. 5-13, supra, shows that this contention is groundless.

Court may cast its order in the form of a memorandum opinion without setting forth specific findings of fact and separate conclusions of law. A R Inc. v. Electro-Voice, Incorporated, 311 F. 2d 508, 513 (C.A. 7, 1962). This Court has pointed out that although findings of fact and conclusions of law are not required in deciding motions for summary judgment, the District Court may nevertheless enter such findings. United States v. Western Electric Co., 337 F. 2d 568, 572 (C.A. 9, 1964); Trowler v. Phillips, 260 F. 2d 924, 926 (C.A. 9, 1958).

Although the District Court was not required to conform its findings of fact and conclusions of law to Rule 52, it is clear <sup>18/</sup> that the Court's findings do conform precisely to that Rule. Compare the findings entered by the Court (R. 20) with the findings in Securities and Exchange Commission v. Los Angeles Trust Deed &

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<sup>18/</sup> Appellants contend that certain of the findings of fact are, in effect, merely conclusions of law (Br. 17). Aside from the fact that they are incorrect, they overlook the fact that the Court's findings specifically provide that if any "finding of fact may be construed more properly as a conclusion of law, the same is hereby adopted and incorporated herein as a conclusion of law" (R. 20, p. 13).

Mortgage Exchange, 186 F. Supp. 830 (S.D. Cal., 1960), modified  
and affirmed, 285 F. 2d 162 (C.A. 9), cert. denied, 366 U.S. 919  
(1961).

II. THE DISTRICT COURT DID NOT ABUSE ITS  
DISCRETION IN GRANTING SUMMARY JUDGMENT  
AS THE RECORD INDICATED A REASONABLE  
LIKELIHOOD OF SIMILAR VIOLATIONS IN THE  
FUTURE.

A. Introduction.

Counsel for the appellants in urging that the case should  
be dismissed as moot, or that summary judgment should be entered  
on behalf of all the appellants, treats the appellants as a single  
entity without drawing any distinction whatever between the  
individual and corporate appellants. We believe, however, that  
in determining whether the appellants' past conduct and other  
pertinent circumstances indicate a likelihood of similar violations  
in the future, it is highly important to keep in mind that Allen  
and Neve are the real violators herein, and the corporate appellants  
are merely instruments through which they accomplished their unlawful  
activities.

B. Purported Cessation of Illegal  
Activities as a Result of the  
Commission's Investigation Does  
Not Bar Injunctive Relief.

This is not a case in which the violators have permanently  
abandoned their unlawful activities and demonstrated that they will

not revert to their former ways. The appellants began selling their investment plan to the public about February 1958 and continued selling until at least May 1962 (R. 1, 4). In fact, even as late as May 1962, they were still creating trusts, and the assignment of fractional interests therein to investors continued until at least June 1962.<sup>19/</sup> In light of this background, there can be little doubt that the temporary cessation of sales after May 1962 was caused by the Commission's investigation. Moreover, absence of recent sales is not entirely of the appellants' own choosing. Since August 30, 1962, Allen and Neve have been restrained and enjoined by order of the District Court from continuing their unlawful selling activities (R. 2, 10, 21, 25).

The contention of Allen and Neve that they do not intend to engage in the future in the practices constituting the violations set forth in the Commission's complaint (Br. 15, 22, 25, 26) is, in light of the record, disingenuous. Neve did not submit an affidavit or any other evidence showing that he would not resume unlawful sales and the affidavit submitted by Allen (R. 5) more than hinted that the appellants did not intend to cease offering their investment plan, but merely intended to clothe future sales

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<sup>19/</sup> Trust No. 4355 appended to affidavit of Hutton (R. 3).



20/

in real estate terminology. In this connection, appellants rely heavily on the affidavits of the appellant Allen and of Chester J. Peterson who were contacted in the summer of 1962 by the Commission's staff member Hutton, "as representatives of the appellants" (Br. 12). Appellants' brief characterizes the affiants as having then advised Mr. Hutton "that in view of Mr. Hutton's belief that such sales constituted the sale of a security, no further sales would be made by any of the defendants in the manner and form objected to by Mr. Hutton . . . and that any sales in the future would be made by deed rather than by the deed and assignment to which Mr. Hutton objected" (Br. 13). This is, of course, a clear admission that the illegal sales were discontinued only because of an opinion of Mr. Hutton in which the appellants obviously did not concur and not because of any permanent intention to terminate their ventures of which the Commission here complains.

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20/ The affidavit of Arnett (R. 7), an officer of International, does state that none of the appellants intend to offer investment contracts in any manner or form whatever. Arnett states, however, that Allen and Neve are no longer associated with the appellant corporations which merged with International. It is clear, therefore, that Arnett is not in a position to testify as to the intentions of Allen or Neve.



Indeed, the plain intent was to continue but on a modified basis which would supposedly circumvent the Securities Act. Moreover, this intention apparently continues to the present time inasmuch as the appellants' brief asserts that no injunction is necessary because there is no need for the appellants to repeat their unlawful sales "as interests in real property can quite properly be transferred by deed rather than by deed and assignment of beneficial interest" (Br. 22).

Furthermore, from the start appellants have contended that what they were selling was not a security and they even sought to dissuade the Commission's investigator by telling him that "the Attorney General of the State of Arizona had stated the sales did not involve securities under the laws of the State of Arizona, and they did not believe they were guilty of violating the laws of the United States" (Br. 12). The District Court could well have concluded from this that they had no honest intention to discontinue a practice which they professed to believe was entirely lawful

beyond the time during which they had to discontinue because of the  
21/  
outstanding temporary injunction.

Allen and Neve cannot avoid the registration requirements of the Securities Act by evasion or subterfuge. The investment plan which they sold to the investing public is a security and would remain such regardless of any change in the terminology used in the instruments of conveyance, or any change in the mechanics employed to carry out their ventures. As noted, in Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946), the Supreme Court, in holding that sales of units of a citrus grove development coupled with management contracts were "investment contracts" notwithstanding that the instruments in question took

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21/ Indeed, Judge Craig said as much in footnote 5 to his findings and conclusions (R. 20, p. 12). He there stated that the appellants "at all times have denied that they were engaged in the sale of 'securities' in the form of 'investment contracts' within the meaning of Section 2(1) of the Securities Act, 15 U.S.C. §77b(1), and have defended vigorously the legality of the activities which the Commission has challenged. This fact, standing alone, . . . gives rise to the distinct likelihood that they may resume the course of action which they now say they have abandoned."

the form of real estate documents and their verbiage was typically such, pointed out (328 U.S. at 300):

"Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. It follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed . . . ."

Under the circumstances herein, temporary cessation of sales during the brief period preceding entry of the restraining order, while the Commission's investigation was in progress, <sup>22/</sup> clearly does not bar injunctive relief. The test for issuance of a statutory injunction is whether the violator's past conduct indicates - under all the circumstances and not merely in view of the time which

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22/ Appellants contend that they made no sales since May 1962 (R. 4). The restraining order was entered on August 30, 1962 (R. 2). The appellants were aware of the Commission's investigation by at least July 1962 (R. 4).

has elapsed since the latest violation - that there is a reasonable likelihood of similar future violations. Securities and Exchange

Commission v. Culpepper, 270 F. 2d 241, 249 (C.A. 2, 1959);

Securities and Exchange Commission v. Universal Service Association,

106 F. 2d 232, 239-240 (C.A. 7, 1939), cert. denied, 308 U.S. 622

(1940); Otis & Co. v. Securities and Exchange Commission, 106 F. 2d  
23/

579, 584 (C.A. 6, 1939). Accordingly, in the cases mentioned

above, the Commission was granted injunctive relief because the

violator's past conduct indicated a reasonable likelihood of

similar future violations, notwithstanding that illegal activities

24/  
ceased prior to the institution of the injunctive action.

In Culpepper, the Court, in holding that a permanent

injunction was necessary for the protection of the public interest

in view of the appellants' past violations, said that "the Commission

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23/ See Loss, Securities Regulation, Vol. III (2d ed., 1961), p. 1976.

24/ For other cases holding that cessation of illegal activities does not bar injunctive relief, see Securities and Exchange Commission v. Okin, 139 F. 2d 87, 88 (C.A. 2, 1943); Securities and Exchange Commission v. Bennett & Co., 207 F. Supp. 919, 923 (D. N.J., 1962).



should not be required to keep these appellants under surveillance and to bring a subsequent injunction action if they commence again to sell 'tainted [unregistered] stock'" (270 F. 2d at 250). The Court stated that the Commission is entitled to an injunction under the Securities Act when "there is a reasonable expectation that the defendants will thwart the policy of the Act by engaging in activities proscribed thereby" (270 F. 2d at 249).

In Securities and Exchange Commission v. Keller Corp., 323 F. 2d 397, 402 (C.A. 7, 1963), a case involving, among other issues, whether the defendants violated anti-fraud provisions of the Securities Act, the Court, in rejecting the contention that injunctive relief was not necessary because violations did not continue up until entry of the preliminary injunction, observed that past misconduct "gives rise to the inference that there was a reasonable likelihood of future violations."

Where a discontinuance of illegal activities results from a violator's cessation at or about the time of the Commission's initiation of an investigation into those activities, then especially is no reason furnished for denying injunctive relief. As the Court of Appeals for the Second Circuit said in Securities



and Exchange Commission v. Boren, 283 F. 2d 312, 313 (C.A. 2,  
1960):

"[T]he cases are clear that a cessation of the  
alleged objectionable activities by the defend-  
ant in contemplation of an SEC suit will not  
defeat the district court's power to grant an  
injunction restraining continued activity . . . ."

As Judge Craig puts it very aptly in this case (R. 20, pp.

10-11):

"The Courts and the Commission are not  
without experience in evaluating contentions by  
entrepreneurs of enterprises of dubious quality -  
when caught up by suits to enjoin their illegal  
offerings - that they have discontinued their  
solicitations of members of the investing public  
and that injunctive relief is not required.  
That is the defense most commonly advanced.

"If allowed by the Courts, such contentions  
would rob the federal securities laws of much of  
their meaning. The Courts, however, have seen

through defenses of 'mootness' and have applied  
25/  
suitable sanctions . . . ."

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25/ This is somewhat analogous to the situation in which the staff recommends that the Commission institute proceedings to revoke the registration of a broker-dealer who, upon the institution of such proceedings, seeks to withdraw his registration and thus render moot the question of whether he is a violator of the federal securities laws. The courts have consistently held that the Commission does not have to accept such an alleged violator's attempt to withdraw from registration. The Commission may continue its revocation proceedings and thereby, if the case against him is proved, invoke a bar (Section 15(b)(5) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(5)) to his re-entering the broker-dealer business, rather than be forced to discontinue its proceedings and forever after have to maintain surveillance over the possibility that a violator of the federal securities laws may later seek to re-enter the broker-dealer field. See, e.g., Peoples Securities Co. v. Securities and Exchange Commission, 289 F. 2d 268 (C.A. 5, 1961); Blaise D'Antoni & Associates, Inc. v. Securities and Exchange Commission, 289 F. 2d 276 (C.A. 5, 1961), rehearing denied, 290 F. 2d 688, cert. denied, 368 U.S. 899

None of the cases cited by the appellants (Br. 18-22) stand for the principle that cessation of illegal activities at about the same time that an administrative agency initiates its investigation bars injunctive relief. In fact, several of these cases actually militate against the position argued by the appellants. They cite (Br. 18) United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952), 72 S. Ct. 690, 695, for the principle that "[t]he sole function of an action for injunction is to forestall future violations." There, in an antitrust case, the Court was referring to violations which had ceased seven years before the United States commenced its suit for injunctive relief (343 U.S. at 334). The Court held that since the activities had been abandoned for seven years and there was no threat of resumption, the United States was not entitled to injunctive relief (343 U.S. at 334). The Court observed, however, that "[w]hen defendants are shown to have settled into a continuing practice . . . courts will not assume that it has been abandoned without clear proof. [citation omitted.] It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption [citation omitted]" (343 U.S. at 333).

In Bowles v. Carnegie-Illinois Steel Corp., 149 F. 2d 545 (C.A. 7, 1945), a case upon which the appellants seem to place heavy emphasis (Br. 18-19), the Court refused to decide whether the defendant, one of the largest steel producers in the United States, purchased steel scrap at prices in excess of the ceiling set under wartime price regulations, although the Court obviously felt that if violations had occurred, they were somewhat technical and were caused to some extent by error and inadvertence. The Court said that injunctive relief was not appropriate, noting that the defendant, itself, informed the Price Administrator of its activities and immediately ceased them when advised that such activities did not conform to the Price Schedule, and the Price Administrator thereafter waited six months before bringing suit (149 F. 2d at 548). The Court found that there was no evidence whatever to indicate that the defendant would renew the objectionable activities and noted that eventually the Price Administrator directed



the defendant to engage in the very practices which were objected  
to in the complaint (149 F. 2d at 548).<sup>26/</sup>

In Securities and Exchange Commission v. Torr, 87 F. 2d  
466 (C.A. 2, 1937), (Br. 20, 21), the Court held that "[o]rdinarily,  
it is no sufficient answer to a motion for an injunction that the  
improper conduct repeated in the past has been discontinued when  
action to impose legal restraint is known or thought to be in the  
offing" (87 F. 2d at 449), but reversed the order granting the

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26/ Shore v. United States, 282 Fed. 857 (C.A. 7, 1922) and Blease v.  
Safety Transit Co., 50 F. 2d 852 (C.A. 4, 1931), (Br. 19, 20),  
are also inapposite. Neither case involved a statute comparable  
to Section 20(b) of the Securities Act, which confers upon the  
Commission broad authority to seek injunctive relief. In Shore,  
the primary issue was the power of a court of equity to abate  
a nuisance. The issue in Blease was whether a state railroad  
commission could seek injunctive relief to enjoin a common  
carrier from operating its busses in intrastate commerce,  
under circumstances where there was no showing that the carrier  
had or intended to so operate except as authorized by law.



Commission's motion for preliminary injunction because the defendants had engaged in the objectionable activities for only a little over a month and because, until the disputed facts could be tested by trial, the Court accepted the defendants' contention that they were attempting to conform to the law and past violations, if any, were inadvertent (87 F. 2d at 450). Circuit Judge Learned Hand dissented, pointing out that the record reflected the "probability of a repetition of the wrong" (87 F. 2d at 450). It is not without significance that upon the trial on the merits, the District Court permanently enjoined most of the defendants. Securities and Exchange Commission v. Torr, 22 F. Supp. 602 (S.D. N.Y., 1938).

Nor are Hecht Co. v. Bowles, 321 U.S. 321 (1944), and United States v. W. T. Grant Co., 345 U.S. 629 (1953), (Br. 19, 21), any comfort to the appellants. In Hecht, the Supreme Court noted that cessation of illegal conduct, even before institution of suit, does not bar injunctive relief (321 U.S. at 327), but held that under the special circumstances there involved - good faith difficulty of a large department store in complying with wartime price regulations - injunctive relief was not appropriate. In Grant, the Supreme Court said that injunctive relief may not be appropriate if a violator "can demonstrate that 'there is no reasonable expectation that the wrong will be repeated'" (345 U.S.

at 633), but noted that the violator's burden of proof is "a heavy one" (345 U.S. at 633).

Surely, the appellants in this case have not satisfied this "heavy burden" by merely stating that they intend to refrain from unlawful sales in the future (Br. 15, 22, 25, 26). The District Court rejected these self-serving declarations of good intentions. Under similar circumstances, other courts have likewise refused to withhold injunctive relief to the Commission, which it sought in the public interest, simply because violators, when caught up in suits to enjoin their objectionable activities, promised to refrain in the future. See, R. J. Koeppe & Co. v. Securities and Exchange Commission, 95 F. 2d 550, 553 (C.A. 7, 1938); Securities and Exchange Commission v. Mono-Kearsarge Consolidated Mining Co., 167 F. Supp. 248, 261 (D. Utah, 1958); Securities and Exchange Commission v. Lawson, 24 F. Supp. 360, 365 (D. Md., 1938). The District Court specifically found that there is no assurance that appellants Allen and Neve "may not, at some future date, resume their unlawful activities" (R. 20, p. 8). This finding was fully supported by the history of past violations, and the distinct possibility that these appellants would continue sales in the future by clothing their investment plan in real estate terminology. Moreover, as noted, p. 31, fn. 21, supra, the District Court believed

that the appellants' declarations that they would not continue their selling activities was somewhat at odds with the fact that throughout the proceedings below they defended vigorously the legality of the activities which the Commission challenged. Cf. Otis & Co. v. Securities and Exchange Commission, 106 F. 2d 579, 584 (C.A. 6, 1939). For these reasons, the contention of the appellants that the District Court did not find that there was "some threat of future violations" (Br. 25) as required by Rule 65(h) of the Federal Rules of Civil Procedure, is clearly without merit.

C. Dissolution of Certain Corporate Appellants Does Not Bar Injunctive Relief.

The appellants contend that there is no need for injunctive relief because the summary judgment of permanent injunction enjoins only the sale of securities issued by the appellant corporations, and all of these corporations have been liquidated or are inactive (Br. 22). Aside from the fact that the appellants have not established that one of the corporate appellants, Allen Neve Enterprises, Inc., is either defunct or inactive (p. 13, supra), appellants misstate the scope of the permanent injunction, which enjoins the appellants from the sale of any "securities issued by the defendant corporations (or by any affiliated person or

corporation now existing or hereafter to be formed) . . . or any other securities" (emphasis added, R. 21). Since the appellant corporations were merely the instruments through which Allen and Neve publicly offered and sold their investment plan, it is clear that the injunction was intended to and does prohibit the individual appellants from continuing their violations by creating other companies as media for unlawful sales.

The fact that certain of the corporate appellants have merged with International, subsequent to entry of the restraining order, does not bar injunctive relief even as to those appellants. In Securities and Exchange Commission v. Electronics Securities Corp., 217 F. Supp. 831, 833 (D. Minn., 1963), the Commission was granted injunctive relief even though the corporate defendant had already surrendered its securities license to the State Securities Division and ceased to exist as an active corporation. In Securities and Exchange Commission v. Culpepper, 270 F. 2d 241, 250-251 (C.A. 2, 1959), and Securities and Exchange Commission v. Lawson, 24 F. Supp. 360, 365 (D. Md., 1938), injunctions were issued against broker-dealers who had discontinued their securities businesses prior to trial. Cf. Securities and Exchange Commission v. Universal Service Association, 106 F. 2d 232, 239-240 (C.A. 7, 1939), cert. denied, 308 U.S. 622 (1940).



In Standard Container Mfrs.' Ass'n. v. Federal Trade Commission, 119 F. 2d 262, 265 (C.A. 5, 1941), in affirming as modified a cease and desist order issued by the Federal Trade Commission, the Court evaluated the contentions of certain petitioners that the order should not run against them as they were out of business or in bankruptcy, as follows:

"[T]he order is not retrospective, but wholly prospective in operation, and if these petitioners are really out of business to stay, they can take no harm from it. But questions of harm aside, they were in business when the proceeding was properly begun against, and jurisdiction properly obtained over, them; that jurisdiction was not lost by their going out of business or taking bankruptcy; and these facts furnish no <sup>27/</sup> ground for setting the order aside."

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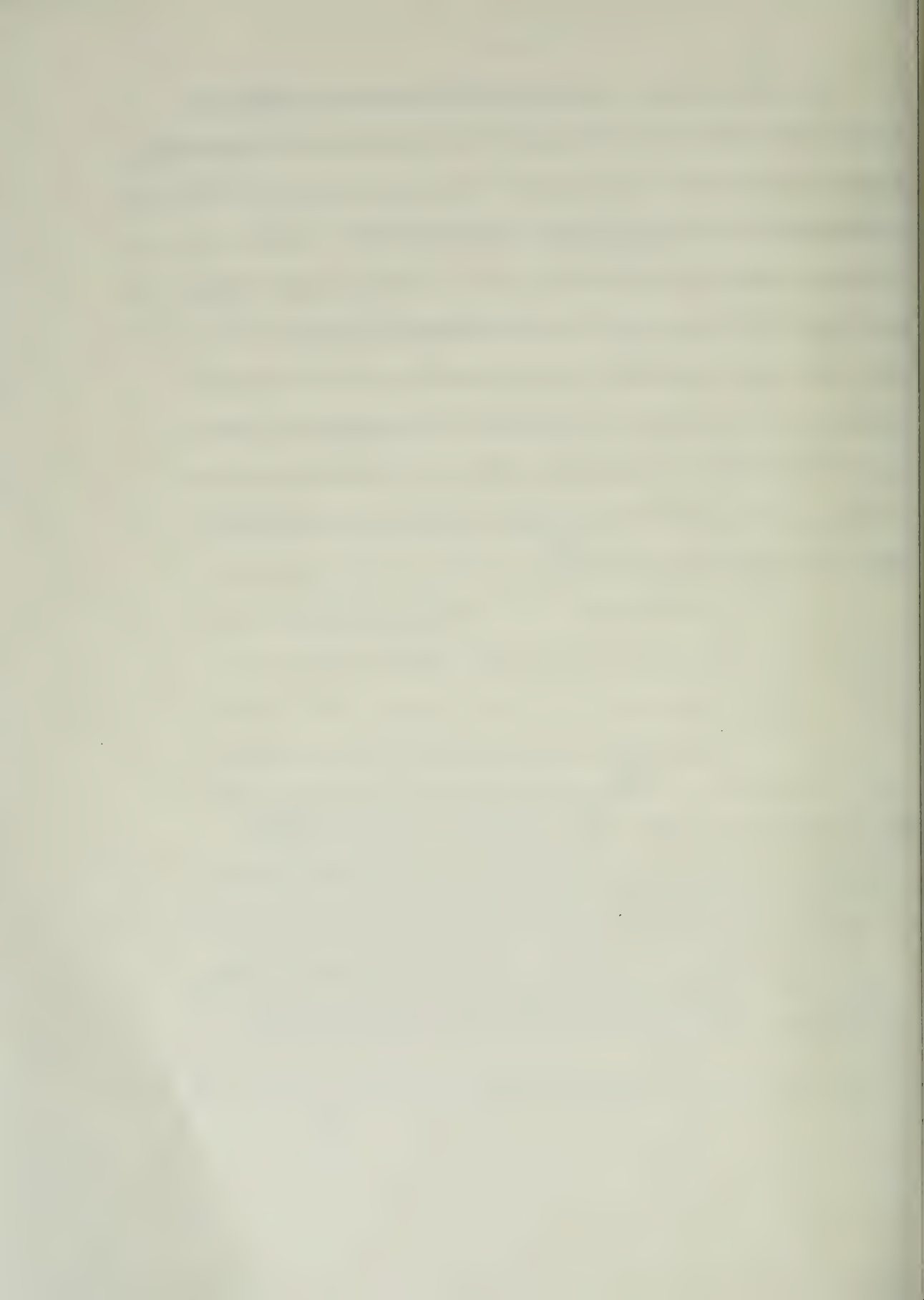
<sup>27/</sup> See also United States v. Trans-Missouri Freight Association, 166 U.S. 290, 308 (1897), where, in an antitrust case, the Supreme Court refused to dismiss the government's appeal even though the defendant association had voluntarily dissolved. Cf. Goodman v. Federal Trade Commission, 244 F. 2d 584, 593 (C.A. 9, 1957).



In the context of the entire record, we believe that the District Court best served the public interest by entering summary judgment of permanent injunction as to both the individual and corporate appellants even though the primary danger to the investing public arises from the likelihood that the individual appellants will resume their unlawful course of conduct. If this Court should conclude, however, contrary to our views, that injunctive relief should not run against the dissolved corporate appellants, it would be preferable that this Court so modify the decree entered by the District Court, rather than remanding the 28/ case for further proceedings.

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28/ We believe that this Court should not consider removing under any circumstances the injunction as to Great Western, which still exists as a separate corporation, or as to Allen Neve Enterprises, Inc., which, so far as the record shows, is still active and under the control of Allen and Neve.



CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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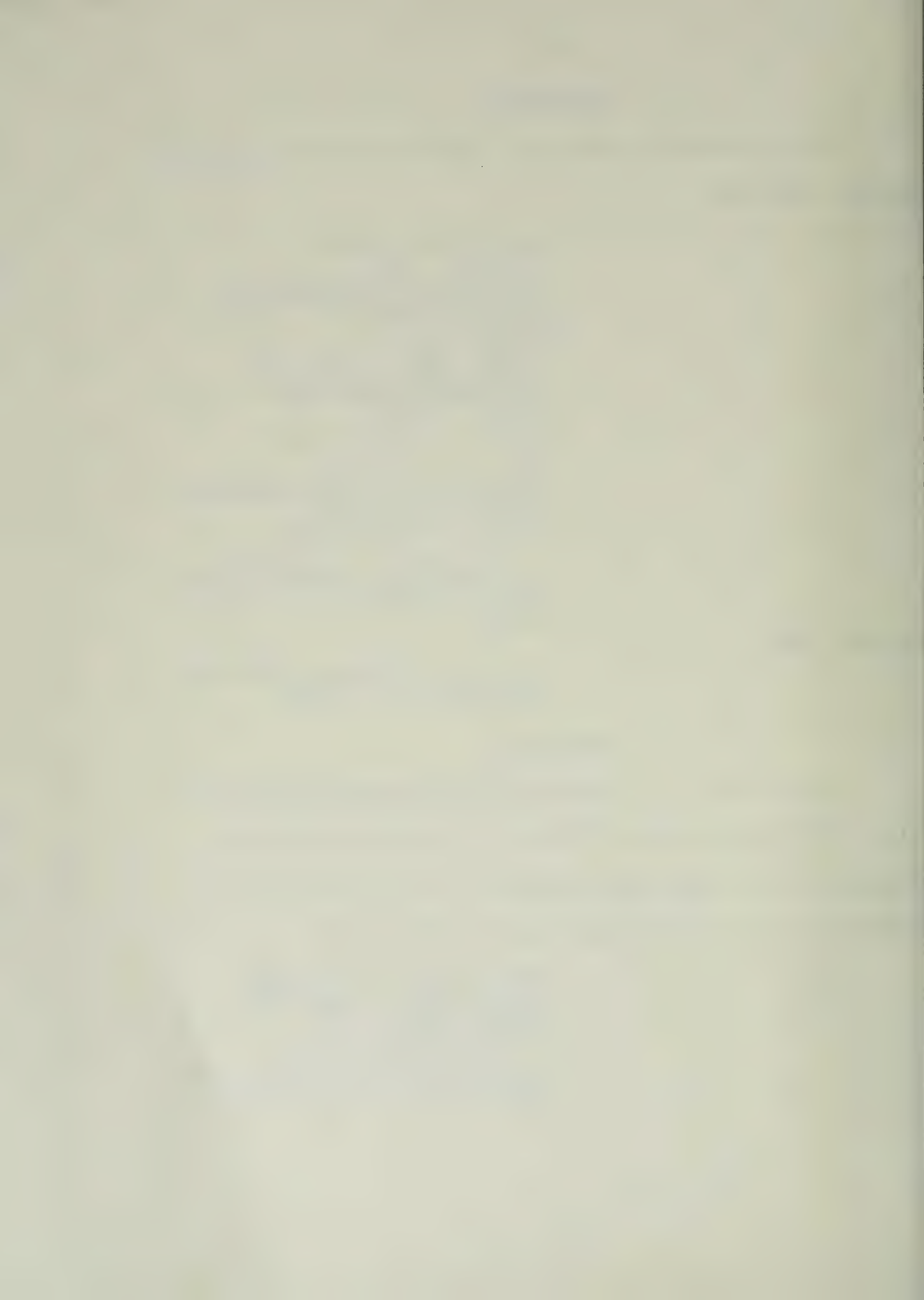
September 1965

Securities and Exchange Commission  
Washington, D.C. 20549

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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STATUTORY APPENDIX

SECURITIES ACT OF 1933

An Act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Section 1. This act may be cited the Securities Act of 1933.

SEC. 2. When used in this title, unless the context otherwise requires—

(1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest in an instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

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\* \* \*

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

2/

\* \* \*

15 U.S.C. 77b(1).

15 U.S.C. 77e.



**Sec. 20.**

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the United States District Court for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received. 3/

★ ★ ★

**SEC. 22.** (a) The district courts of the United States, the United States courts of any Territory and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with the State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 129 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

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3/ 15 U.S.C. 77t(b).

4/ 15 U.S.C. 77v(a).

No. 20,228

United States Court of Appeals

For the Ninth Circuit

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GREAT WESTERN LAND AND DEVELOPMENT, INC., et al.,

*Appellants,*

vs.

SECURITIES AND EXCHANGE COMMISSION,

*Appellee.*

Appeal from the United States District Court  
for the District of Arizona

APPELLANTS' OPENING BRIEF

---

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FILED

AUG 24 1935

FRANK H. SCHILD, CLERK



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No. 20,228

**United States Court of Appeals  
For the Ninth Circuit**

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GREAT WESTERN LAND AND DEVELOP-  
MENT, INC., et al.,

*Appellants,*

vs.

SECURITIES AND EXCHANGE COMMISSION,

*Appellee.*

**Appeal from the United States District Court  
for the District of Arizona**

**APPELLANTS' OPENING BRIEF**

---

**STATEMENT OF JURISDICTION**

Appellee, Securities and Exchange Commission, initiated this action by a complaint for injunction under Section 22 (A) of the Securities Act of 1933 as amended (15 U.S.C. 77 v. (a)). (R. document numbered 1). No objection was interposed to the jurisdiction of the United States District Court.

The jurisdiction of the Court of Appeals to review all final decisions of the District Courts of the United States rests in Title 28, Section 1291 U.S.C.A., as amended July 7, 1958, Public Law 85-508 Section 12(e), 72 Stat. 348.

**STATEMENT OF THE CASE**

On August 30, 1962, appellee filed a complaint for injunction in the District Court for the District of Arizona alleging that since on or about February of 1958, the appellants, and each of them, had been and were then violating the Provisions of the Securities Act of 1933 (R. document numbered 1). Attached to said complaint were affidavits of Lester R. Arie, Sally Arie, George Goettlinger and Arthur H. Hutton (R. documents numbered 3).

The District Court thereupon issued a temporary restraining order and order to show cause directed to the appellants (R. document numbered 2).

The appellants denied they were either engaged in or about to engage in, acts or practices which constituted violations of the laws of the United States (R. document numbered 4).

On the same date, the appellants moved the District Court to enter an order quashing the temporary restraining order and order to show cause on the grounds that appellants were not at that time engaged, or about to engage, in acts or practices constituting a violation of the Securities Act of 1933. This motion was supported by an affidavit of Wayne H. Allen and Chester J. Peterson affirming that appellants had not engaged in any of the acts complained of by the appellee since May, 1962; that they did not believe such acts to be in violation of the Securities Act of 1933; that they had, furthermore, advised Arthur H. Hutton, agent for appellee, prior to the filing of appellee's complaint, that they were not and

would not in the future engage in any of the acts objected to by Mr. Hutton (R. documents numbered 5).

Defendants' motion was presented to the late Judge Arthur M. Davis. Briefs were requested and filed; however, before handing down a decision Judge Davis passed away and the matter remained in status quo until early in 1964 when appellee urged the Court to enter a preliminary injunction.

Appellants then filed a motion to dismiss for mootness, supported by an affidavit of William W. Arnett wherein Arnett swore that the stock of the appellant corporations had been acquired by International Investments Limited, a corporation, and that all of said corporations, except Great Western Land & Development, Inc., had been merged into International Investments Limited and were no longer in existence. He also swore that the appellant, Great Western Land & Development, Inc., was inactive, no longer had a broker's license and was completely controlled by International Investments Limited, which did not intend to activate or use said corporation in the manner formerly operated. He also swore that appellants Wayne H. Allen and E. J. Neve no longer had any interest in, or connection with, any of appellant corporations, and were not offering to the public, or to any individual, any of the contracts mentioned in appellee's complaint. He concluded that none of the appellant corporations intended or desired to ever enter into any transaction of the nature or similar to those complained of in the complaint (R. documents numbered 7).



On March 16, 1964, Judge William J. Lundberg entered a preliminary injunction, at the same time denying appellants' motion to dismiss for mootness (R. document numbered 10).

Thereafter, the appellee filed a motion for summary judgment, together with affidavits of William M. Ziering and Kenneth Miller (R. documents numbered 11). Appellants filed objection to the motion for summary judgment, supporting the same by an affidavit of Chester J. Peterson.

Hearing was had on the motion for summary judgment before the Honorable Walter E. Craig, United States District Judge, who, on April 7, 1965, entered a minute order for summary judgment directing counsel for the appellee to submit proposed findings of fact, conclusions of law and proposed form of judgment (R. document numbered 13).

Appellee presented proposed findings of fact and conclusions of law (R. documents numbered 14), and the appellants entered objections (R. documents numbered 15). Appellants also entered objection to the proposed summary judgment of permanent injunction (R. document numbered 16), and presented their own set of proposed findings of fact, conclusions of law and judgment of dismissal (R. documents numbered 17 and 18).

Thereafter, on May 14, 1965, the Honorable Walter E. Craig entered a minute order denying the objections to the proposed summary judgment of permanent injunction, denying the proposed findings of fact, conclusions of law and proposed judgment sub-

mitted by the appellants and granting the proposed findings of fact, conclusions of law and judgment submitted by the appellee, as modified by the Court (R. document numbered 19).

The Court's findings of fact and conclusions of law as modified and summary judgment of permanent injunction were signed by the Court on May 11, 1965 (R. documents numbered 20 and 21).

This appeal followed:

The precise issues before this Court, in the opinion of the appellants, are these:

1) Were the appellants entitled to have this matter dismissed for mootness on the basis of the record and particularly by virtue of the undisputed facts set forth in the affidavit of William W. Arnett.

2) Were there undisputed facts showing that appellee was entitled to the extraordinary relief of summary judgment of permanent injunction against the appellants, as a matter of law.

3) Were there undisputed facts showing that the appellants were entitled to judgment of dismissal as a matter of law.

---

#### **SPECIFICATION OF ERRORS**

1) The District Court erred in granting the appellee's motion for summary judgment for the following reasons:

a. The undisputed evidence shows the question before the Court had become moot.

b. The uncontroverted facts show that appellee was not entitled to a summary judgment of permanent injunction as a matter of law.

c. The uncontroverted facts show that appellants were entitled to judgment of dismissal as a matter of law.

2) The District Court erred in making findings of fact A 1; C 1, 2, 3, 4, 5 and 6; D, E and G, for the following reasons:

a. Findings A 1, C 1, 3 and 6 and G are contrary to the uncontroverted facts established by the affidavits filed herein.

b. Findings C 1, 2, 3, 4, 5, 6; E and G amount to mere argument and are not facts.

c. The said facts are insufficient and inadequate.

d. The findings are insufficient to show any necessity for the extraordinary relief of injunction.

3) The District Court erred in adopting its conclusions of law for the following reasons:

a. The findings of fact are insufficient to support said conclusions.

b. The uncontroverted facts established by the affidavits herein reflect that said conclusions are not pertinent.

c. Said conclusions are not comprehensive enough to provide a basis for the summary judgment granted by the Court.

4) The District Court erred in granting, approving and signing the formal written Summary Judgment of Permanent Injunction for the following reasons:

a. The questions presented by the appellee's complaint had become moot.

b. The uncontroverted facts reflect that there is no necessity for the extraordinary relief of injunction.

c. The uncontroverted facts reflect that the appellants are entitled to judgment of dismissal as a matter of law.

---

## SUMMARY OF ARGUMENT

### I

On a motion for summary judgment, the record will be viewed in the light most favorable to the party opposing the motion.

### II

Supporting and opposing affidavits filed in connection with a motion for summary judgment must be made on personal knowledge, must set forth facts which would be admissible in evidence and must show affirmatively that the affiant is competent to testify to the matters stated therein.

### III

The Court must find the facts specifically and same must be clear and concise and sufficiently comprehensive and pertinent to provide a basis for the decision.

## IV

The sole function of an injunction is to forestall future violations.

## V

Where a motion for summary judgment has been made under Fed. R. Civ. P. 56, the District Court has authority to enter a summary judgment against the moving party even though there has been no cross motion for summary judgment.

## VI

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in its terms and shall describe in reasonable detail and not by reference to the complaint or other documents, the act or acts sought to be restrained.

---

**ARGUMENT**

Emphasis will be ours unless otherwise indicated.

## I

**ON A MOTION FOR SUMMARY JUDGMENT, THE RECORD WILL  
BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE  
PARTY OPPOSING THE MOTION.**

This well established rule was recently reiterated by the United States Supreme Court in the case of *Poller v. Columbia Broadcasting System, Inc.* (App. D.C. 1962), 82 S.Ct. 486, 368 U.S. 464, 7 L. Ed. 2d 458.



As pointed out by the Court in the case of *Oppenheimer v. Morton Hotel Corp.* (D.C. Mich. 1962), 210 F.Supp. 609, affirmed 324 F.2d 766, a summary judgment is an extreme remedy and the facts must be taken as most favorable to the party against whom the motion is sought.

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## II

**SUPPORTING AND OPPOSING AFFIDAVITS FILED IN CONNECTION WITH A MOTION FOR SUMMARY JUDGMENT MUST BE MADE ON PERSONAL KNOWLEDGE, MUST SET FORTH FACTS WHICH WOULD BE ADMISSIBLE IN EVIDENCE AND MUST SHOW AFFIRMATIVELY THAT THE AFFIANT IS COMPETENT TO TESTIFY TO THE MATTERS STATED THEREIN.**

The foregoing rules are taken from the Rules of Civil Procedure, Rule 56 (e).

In view of the rules set forth under I and II above, let us consider the motion of appellee for summary judgment. Said motion was, according to its terms, based upon "the pleadings, supported by the affidavits of Lester R. Arie, Sally Arie, George Goettlinger, Arthur H. Hutton and K. D. Mattison, on file herein, and the affidavits of William M. Ziering and Kenneth Miller, annexed hereto". The pleadings are unverified so we must turn to the affidavits to learn the facts in this matter.

It would appear that the affidavits of Arthur H. Hutton and William M. Ziering do not comply with the provisions of Rule 56 (e). They were evidently prepared for the purpose of attaching documents,

which in the case of Arthur H. Hutton are filed in the Phoenix Title & Trust Company, and in the case of William M. Ziering are filed in the Superior Court of the State of Arizona, in and for the County of Maricopa. It is respectfully submitted that neither Mr. Hutton nor Mr. Ziering have any personal knowledge concerning the papers themselves, or the information set forth therein, and that they would not be competent to testify to the matters stated in said documents. The affidavits themselves do not appear to contain any statements which are relevant to the issues now before the Court.

The affidavits of Lester R. Arie, Sally Arie and George Goettlinger merely show that sometime during July of 1959, Mrs. Arie placed a check in the mails and received through the mails a description of land which she had purchased and certain papers which she signed in the offices of Great Western Land & Development, Inc. and that Mr. Goettlinger received through the mails, sometime during November of 1961, a deed and assignment of beneficial interest which he had signed previously. Nothing in any of these affidavits reflect the responsibility of any of the appellants for use of the mails. No statement is made to establish who mailed the documents or by whose authority they were mailed.

The affidavit of K. D. Mattison, Trust Officer of the Phoenix Title & Trust Company, executed on February 21, 1964, merely sets forth the procedure followed by Phoenix Title & Trust Company in accepting subdivision trust agreements. This procedure is fol-

lowed not only for the appellants, but also for all of the other persons, partnerships and corporations establishing a subdivision trust agreement with the Phoenix Title & Trust Company.

This affidavit does not reflect any use of the mails or other methods of communication or transportation by any of the appellants. The affidavit of Kenneth Miller reflects a telephone conversation and correspondence between Mr. Miller and one Joseph Allen. He states that Mr. Allen is the local representative or salesman of the appellant Great Western Land & Development, Inc., but does not connect Mr. Allen with any of the other appellants. The telephone conversation took place in September of 1959 and the correspondence took place in May of 1960.

It might be pointed out that under the Law of Arizona, agency may not be established in this manner. In *Litchfield v. Green*, 33 P.2d 290, 43 Ariz. 509, the Supreme Court of the State said:

“‘It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent *cannot create in himself an authority to do a particular act by its performance*; and that the *authority of an agent cannot be proved by his own statement that he is such.*’ ”

A further statement in the same case is:

“‘But where the nature and extent of an agent’s authority is directly involved, it must never be lost sight of; and this cannot be too strongly em-

phasized, *that it ultimately may be established only by tracing it to its source in some word or act of the alleged principal.* The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is one." (Emphasis by the Court.)

The appellants' pleadings are also not verified, but are supported by affidavits of Wayne H. Allen and Chester J. Peterson and William W. Arnett (R. documents numbered 5 and 7). The affidavits of Wayne H. Allen and Chester J. Peterson assert that during the Summer of 1962, Arthur H. Hutton contacted Mr. Allen and Mr. Peterson as representatives of the appellants in his capacity as an agent for the appellee; that at that time he stated the sale of undivided interests in real property by the appellants constituted a violation of the laws of the United States, inasmuch as he believed the same constituted the sale of a security without registration with the Securities and Exchange Commission; that during the conversations, both affiants, who were then both officers and directors of the defendant corporations, advised Mr. Hutton that they did not believe they were selling a security, that the Attorney General of the State of Arizona had stated the sales did not involve securities under the laws of the State of Arizona, and they did not believe they were guilty of violating the laws of the United States. The affiants further advised Mr. Hutton that notwithstanding their feeling concerning the sales of undivided interest in real property, none of the appellants had, since May of 1962, made any such sales;



that none of the appellants were at that time contemplating any further sales; that in view of Mr. Hutton's belief that such sales constituted the sale of a security, no further sales would be made by any of the defendants in the manner and form objected to by Mr. Hutton. Affiants further stated that Mr. Hutton was advised that defendants did not want to be in trouble with the Securities and Exchange Commission; did not want to have litigation over Mr. Hutton's claim and that any sales in the future would be made by deed rather than by the deed and assignment to which Mr. Hutton objected. Affiants further stated that Mr. Hutton "*was repeatedly*" advised that none of the sales objected to would be made from the time of his initial contact with the affiants, that no such sales had been made since that time and that the defendants were not then offering, nor did they intend to offer in the future, any such sales or to engage in any of the acts to which Mr. Hutton objected.

The foregoing affidavit was never controverted by Mr. Hutton or any other individual in behalf of the appellee.

In addition to the foregoing affidavit, the appellants also attached an affidavit of William W. Arnett to a motion to dismiss for mootness (R. document numbered 7). In his affidavit, Mr. Arnett stated that he was at that time, February 25, 1964, President of the Great Western Land & Development, Inc. and an officer of the other appellant corporations; that he was also an officer of a corporation known as International Investments Limited; that through the acquisition of



all of the stock of appellant corporations International Investments Limited became the sole stockholder therein and merged into International Investments Limited all of the appellant corporations, save and except Great Western Land & Development, Inc.; that as to this latter corporation it no longer had a broker's license, was not conducting any sales of property, was completely controlled and owned by International Investments Limited and that the latter corporation did not intend to activate or use said Great Western Land & Development, Inc. in the manner in which it was used by the former owners thereof. The affiant further stated that none of the corporations were then active, nor were any of them offering to the public, or to anyone, or at all, the contracts mentioned in appellee's complaint and complained of therein, either directly or indirectly, or at all. He also affirmed that none of the corporations intended to ever again offer said contracts to the public or to any individual, or at all, in any manner, shape or form. In addition he affirmed that the appellants Wayne H. Allen and E. J. Neve no longer owned any interest in or had any stock in any of said appellant corporations. That they had both become disassociated with all of said corporations since the year 1962, and that neither of them were then, nor had they been, offering to the public, or to any individual, any of the contracts mentioned in appellee's complaint since prior to the time when appellee's complaint was filed. The concluding affirmation was that none of the corporations mentioned as appellants in this action intended or desired to ever again enter into

any transactions of the nature, or similar to those complained of, in appellee's complaint, neither then nor in the future.

This affidavit of William W. Arnett was never controverted by anyone in behalf of the appellee.

It would appear to us, therefore, that the competent facts in the record viewed most favorable to the appellants clearly establish that the appellants, upon being informed of the feelings of the appellee concerning the possible illegal nature of their sales of interests in real property, immediately informed the appellee of their belief, up to that time supported by a decision of the Attorney General of the State of Arizona, that they were not in violation of the law, but that in view of the question on the part of Arthur H. Hutton, an agent of the appellee, they immediately discontinued any further offering of the contracts objected to and had not, nor did they intend or desire to ever enter into any such transactions in the future. They stated they would make all sales of real estate by regular deed rather than by the deed and assignment procedures objected to by appellee.

## III

THE COURT MUST FIND THE FACTS SPECIFICALLY AND SAME MUST BE CLEAR AND CONCISE AND SUFFICIENTLY COMPREHENSIVE AND PERTINENT TO PROVIDE A BASIS FOR THE DECISION.

Rule 52 of the Rules of Civil Procedure provides in part: The Court shall find the facts specifically and state separately its conclusion of law thereof, and direct the entry of appropriate judgment.

This rule is not satisfied by mere lip service (*Aetna Insurance Co. v. Stanford*, 273 F.2d 150).

A fair compliance with this rule is mandatory (*Kweskin v. Finkelstein*, 223 F.2d 677).

Findings of fact on every material issue are required by this rule and there must be such subsidiary findings of fact as will support ultimate conclusions reached by the Court (*Kweskin v. Finkelstein*, 223 F. 2d 677).

Findings of fact should not be a mere submission of the details of evidence (*Central Railroad Co. of New Jersey v. Hanover Bank & Trust Co.*, 29 F. Supp. 826).

Findings of fact should be a clear and concise statement of the ultimate facts and not a statement, report or recapitulation of evidence from which facts may be found or inferred (*Brown Paper Co. v. Irvine*, 134 F.2d 337).

The ultimate test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to issues to provide a basis for the decision,

and whether they are supported by evidence (*Carr v. Yokahama Specie Bank*, 200 F.2d 251).

The purpose of findings of fact is to affirm a clear understanding to the Court of Appeals of the basis of the decision of the District Court (*United States v. Horsfall*, 270 F.2d 107).

The purpose of a finding of fact is to distill from the evidence the pertinent facts found to which relevant rules of law may be applied and *speculation may not be submitted for proof*; fact findings require probative facts capable of supporting, with reason, the conclusion expressed (*United States v. 15.3 Acres of Land*, 154 Fed.Supp. 770).

With these rules in mind, it is respectfully submitted that findings A 1, C 1, 3, 6, D and G are not supported by any evidence in any of the affidavits relied upon by the appellee. It will also be observed that findings C 1, 2, 3, 4, 5, 6, D, E and G amount to mere argument; thus, the only findings which appear to comply with the rules above outlined are findings A 2, B and F, which findings are insufficient to support the conclusions of law and Summary Judgment made by the Court.

In addition, it would appear that the conclusions of law are mainly argument and citations from various cases reported in the Federal Reporter Systems, rather than actual conclusions as required under the foregoing rules. It is submitted that neither the findings, nor the conclusions, are sufficient to support



the Summary Judgment of Preliminary Injunction ordered by the Court.

---

#### IV

##### THE SOLE FUNCTION OF AN INJUNCTION IS TO FORESTALL FUTURE VIOLATIONS.

The Supreme Court in the *United States v. Medical Association*, 72 S.Ct. 690, 695 (1952) case, made the following statement regarding suits filed for injunctive relief.

“It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. *The sole function of an action for injunction is to forestall future violations.*”

In the case of *Bowles v. Carnegie Illinois Steel Corp.*, 149 F.2d 545, 547 (7th Cir. 1945), the Court stated:

“An injunction is a relief granted to prevent future misconduct. *It does not issue to prevent a practice which has been definitely and permanently discontinued.*”

In this *Bowles* case, the record reflected a set of facts similar to those set forth in the affidavits now before the Court. The plaintiff had informed the defendant that it would be, in its opinion, a violation of the ceiling price ruling for defendant to use the scrap purchased at electric furnace prices in its open fire furnaces. The defendant immediately acquiesced and discontinued the practice completely. Under these cir-



cumstances the Circuit Court reversed the District Court's order of injunction with directions to dismiss the suit.

Again in the case of *United States v. W. T. Grant Co.*, 73 S.Ct. 894, 898 (1953), the Supreme Court stated:

"The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs. But *the moving party must satisfy the Court that relief is needed. The necessary determination* is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."

The Court's attention is drawn to the following case: *Shore v. United States*, 282 F. 857, where it is stated:

"It is, of course, elementary that the finding should be drawn to conform to the allegations of the complaint. Where injunctive relief is sought because of repeated and continuous breaches of duty or violations of the law, *the evidence must show that such violations, if not prevented, will occur in the future. Relief by injunction looks toward the future.* Its purpose is to prevent future injury or to regulate the future conduct of a party. *If the transgressions have ceased before the bill is filed and before proceedings are instituted, and if it appears that they will not be repeated, injunctive relief will not be granted.* The aggrieved party will be left to his action at law. Hence, in the present instance, if the parties who have maintained their premises as a nuisance

in violation of the National Prohibition Act abated the nuisance and ceased violating the law, prior to the institution of any suit, injunctive relief should have been denied."

We next draw the Court's attention to the case of *Blease v. Safety Transit Co.*, 50 F.2d 852 (4th Cir. 1931), wherein the Court stated:

"It is insisted that the injunction should have been granted to restrain defendant from operating its busses in intrastate business; but there is no evidence that it was attempting to operate in intrastate business except on the route as to which the certificate of public necessity and convenience had been granted, and, so far as the record shows, *no ground to apprehend that it would attempt to operate in intrastate business elsewhere.* Under such circumstances, the injunction was properly denied; for *it is elementary that a court of equity will not grant an injunction to restrain one from doing what he is not attempting and does not intend to do.*"

In *Securities and Exchange Commission v. Torr*, 87 F.2d 446 (2nd Cir. 1937), the Court stated:

"It cannot be justly thought that the accused practices were commenced in disregard of the statute. They were continued for only a little over a month and *only while there is evidence that it was for good cause thought that they were not in violation of the law.* Until the disputed facts can be tested by a trial, the only justifiable conclusion is that the appellants were making a genuine effort to conform to the law and that negatives an inference that violations, such as they were, had

been due to more than mistaken interpretation or would be persisted in after they were called in question. *So far as past conduct is concerned, there was then, no sufficient ground for the preliminary injunction, since it would not support the inference of repetition in the future.*”

The Court concluded its opinion as follows:

*“As the appellants were not engaging in any such acts or practices and the circumstances failed to support any reasonable inference that they were about to engage in any at the time the suit was brought, or at the time the injunction was made effective, we are constrained to hold that it was improvidently granted.”* (Page 450).

In the case of *Hecht Co. v. Bowles*, 321 U.S. 321, 64 Sup.Ct. 587, the Court stated:

*“... Only the other day we stated that ‘An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.’ Meredith v. City of Winter Haven, 320 U. S. 228, 235, 65 S. Ct. 7, 11. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. . . .”*

See also the cases of *United States v. W. T. Grant Co.*, 73 S.Ct. 894, and *United States v. Aluminum Co. of America, et al.*, 148 F.2d 416 (2nd Cir. 1945). In the case of *Securities and Exchange Commission v. Culpepper*, 270 F.2d 241 (2nd Cir. 1959), the Court stated:

“The case may nevertheless be moot if the defendant can demonstrate that ‘*there is no reasonable expectation that the wrong will be repeated*’ ”.

It is respectfully submitted that taking the affidavits of Wayne H. Allen and Chester J. Peterson and William W. Arnett, in their strongest light in favor of the appellants, the appellants have demonstrated that “*there is no reasonable expectation that the wrong will be repeated*”. There isn’t even any necessity for its repetition as interests in real property can quite properly be transferred by deed rather than by deed and assignment of beneficial interest.

It would appear from the uncontroverted facts as they exist in favor of the appellants at this time, that there is no need or necessity for injunctive relief against any of the appellants, particularly in view of the fact that the injunction is directed against the use of instruments of transportation or communication in interstate commerce or the mails “*to sell securities issued by the defendant corporations*”, and all of said corporations have been liquidated or are inactive.



## V

WHERE A MOTION FOR SUMMARY JUDGMENT HAS BEEN MADE UNDER FED. R. CIV. P. 56, THE DISTRICT COURT HAS AUTHORITY TO ENTER A SUMMARY JUDGMENT AGAINST THE MOVING PARTY EVEN THOUGH THERE HAS BEEN NO CROSS MOTION FOR SUMMARY JUDGMENT.

The District Court for the Southern District of New York in 1963, in the case of *Ruby v. American Airlines, Inc.*, 227 F.Supp. 702, stated the foregoing rule of law.

This would seem to be pertinent in this matter where the appellants did propose a form of judgment of dismissal and had previously made a motion to the Court to dismiss this matter for mootness.

In this connection we draw attention to the case of *Local 33 Int. Hod Carriers, etc. v. Mason Tenders, etc.*, 291 F.2d 496, 505 (2nd Cir. 1961), where Circuit Judge Medina stated:

“There remains the question whether there is authority to grant summary judgment for defendants in the absence of a cross motion for summary judgment. It is Professor Moore’s view that such a motion would be a mere formality and is unnecessary in a situation such as we have before us, *where the proofs before the Court show plaintiff has no case*. Moore’s Federal Practice, Vol. 6, pages 2088 and 2089. Although the writer of this opinion expressed a contrary opinion in 1948 as a District Judge, *Truncale v. Blumberg*, D.C., 8 FRD 492, he is glad to take this occasion to state he has changed his mind. Especially where there are several motions by the respective parties *and the evidence of the facts bearing on the issues*



*arising out of the complaint is all before the court in affidavit form, it is most desirable that the Court cut through mere out-worn procedure niceties and make the same decisions as would have been made had defendant made a cross motion for summary judgment."*

As was stated in the case of *Rockoff v. Vitex Mfg. Co.*, 230 F.Supp. 23, 25 (District of Virgin Islands 1964):

*"The plaintiff has not seen fit to file any opposing affidavits, which are permitted under Rule 56 (e) of the Federal Rules of Civil Procedure. Thus, the facts related in defendant's affidavit shall be deemed to have been admitted."*

A further rule, as stated in the case of *Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co.*, 202 F.Supp. 514, 516 (E.D. Missouri 1959) is:

*"Where on the basis of the materials presented by his affidavits the movant would be entitled to a directed verdict and the opposing party fails either to offer counter affidavits or other materials that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party."*

Although the appellants were not the moving parties in this matter, they did move for dismissal at the end of the hearing before Judge Craig and actually presented a judgment of dismissal in an effort to have the Court consider the matter as though a motion had been made by the appellants. It would appear from the foregoing that this Court should reverse

the summary judgment of permanent injunction and instruct the District Court to enter an order dismissing this matter.

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## VI

EVERY ORDER GRANTING AN INJUNCTION AND EVERY RESTRAINING ORDER SHALL SET FORTH THE REASONS FOR ITS ISSUANCE, SHALL BE SPECIFIC IN ITS TERMS AND SHALL DESCRIBE IN REASONABLE DETAIL AND NOT BY REFERENCE TO THE COMPLAINT OR OTHER DOCUMENTS, THE ACT OR ACTS SOUGHT TO BE RESTRAINED.

In addition to what has been said above, appellants feel there is another reason why the summary judgment of permanent injunction should be reversed. The foregoing rule is taken verbatim from Rule 65 (h) of the Rules of Civil Procedure. As we have endeavored to point out above, the sole function of an injunction is to forestall future violations. It would appear, therefore, that the Court, of necessity, would need to find that there was some threat of future violations by or on the part of those being enjoined. The only effort at making any finding on this question is Finding of Fact No. G, which reads: "There is no assurance that the defendants Wayne H. Allen and E. J. Neve may not at some future date, resume their unlawful activities." This would not appear to be a proper finding of fact, as pointed out above. Be that as it may, the uncontroverted affidavit of Wayne H. Allen states that none of the appellants intend to do any such acts in the future. Furthermore, the record reflects that no such sales were made from the

time the questionable nature thereof was mentioned by Arthur H. Hutton and that there was no intention on the part of the defendants to again engage in the activities complained of. Thus, it would appear that not only did the Court fail to find any basis for issuing or granting an injunction, but also the summary judgment of permanent injunction itself fails to comply with Rule 65 (h) in that it does not set forth any reason for its issuance. Furthermore, the restraining order is very general in its terms, is not limited to the acts complained of in the complaint and is directed against appellants which are no longer in existence.

It is respectfully submitted that the summary judgment of permanent injunction is void for not having complied with the provisions of Rule 65 (h) of the Rules of Civil Procedure, and that the same should, therefore, be reversed with directions to the Court to enter judgment in favor of the appellants.

**CONCLUSION**

Appellant respectfully urges that the undisputed evidence established by the uncontroverted affidavits of some of the appellants reflects that there is no necessity for the drastic remedy of injunctive relief; that there is no evidence to establish the probability of the appellants engaging in any of the acts objected to by the appellee or its agents in the future, and that, therefore, this Court should reverse the Summary Judgment of Permanent Injunction entered by the District Court and direct the said Court to enter an order of dismissal in this matter.

Dated, Phoenix, Arizona,

August 24, 1965.

Respectfully submitted,

RAWLINS, ELLIS, BURRUS & KIEWIT,

By CHESTER J. PETERSON,

*Attorneys for Appellants.*

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**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHESTER J. PETERSON,

*Attorney for Appellants.*





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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ALFRED COLEMAN, ET AL.,

APPELLANTS

v.

UNITED STATES OF AMERICA,

APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA, CENTRAL DIVISION

---

BRIEF FOR THE APPELLEE

---

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FOR THE NINTH CIRCUIT

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No. 20227

ALFRED COLEMAN, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA, CENTRAL DIVISION

---

BRIEF FOR THE APPELLEE

---

OPINION BELOW

The district court did not enter an opinion.

JURISDICTION

This is an appeal from a summary judgment entered on February 26, 1965, awarding the United States the right of possession of certain property and a final judgment entered May 12, 1965, in favor of the United States, also assessing damages. This action was instituted by the United States to eject the



appellants from certain invalid placer mining claims located for building stone on 720 acres in the San Bernardino National Forest in California. Jurisdiction of the district court was invoked under 28 U.S.C. sec. 1345. Notice of appeal was filed June 3, 1965. The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

#### QUESTION PRESENTED

Whether the district court, in granting the United States' motion for summary judgment on the issue of ejectment, thereby giving effect to the decision of the Secretary of the Interior, declaring the appellants' mining claims to be null and void, correctly applied the proper standard of review.

#### STATUTES INVOLVED

30 U.S.C. sec. 161 provides:

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests.

30 U.S.C. sec. 611 provides:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

28 U.S.C. sec. 1361 provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

## STATEMENT

This action was instituted by the United States by the filing of a complaint on August 8, 1963, seeking the ejectment of the appellants from some 720 acres of land within the San Bernardino National Forest, California. Damages were also sought in the amount of the reasonable rental value of the lands occupied and the value of the materials removed.

The subject acreage had been occupied by the appellants as a mining property consisting of 18 placer mining claims. The validity of the mining claims, which covered an extensive area of quartzite rock, was challenged by the Department of the Interior, which instituted contest proceedings at the request of the Forest Service, and proceedings were conducted by a hearing examiner. The hearing examiner found five of the mining claims to be valid and the other 13 to be invalid. The Acting Director of the Bureau of Land Management sustained the validity of three claims and part of a fourth. The Secretary of the Interior, acting through his Deputy Solicitor, in considering the appeal taken by Mr. Coleman, reviewed in detail the evidence introduced at the



hearing on the contests. The Deputy Solicitor rendered a decision declaring all of the subject mining claims to be null and void for the reason that a valid discovery had not been made.

United States v. Alfred Coleman, A-28557, March 27, 1962 (App. p. 28).

The Deputy Solicitor's decision in pertinent part held as follows: A mining claimant is entitled to a patent to his mining claim if he has made a discovery of a valuable mineral deposit within the limits of his claim. The Act of August 4, 1892, 30 U.S.C. sec. 161, supra, expressly authorized the location of mining claims for building stone. It was, therefore, essential that the appellants herein show that they had made a discovery of building stone within the limits of their claims. A validating discovery is shown by reasonable evidence of a finding of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). When the mineral claimed as a discovery is one of wide occurrence, to be

considered as a valuable mineral it must be shown that it can be extracted, removed and marketed at a profit. Since Congress withdrew common varieties of building stone from location under the mining laws on July 23, 1955, 30 U.S.C. sec. 611, it was incumbent upon the appellants to show that the building stone could have been extracted, removed, and marketed at a profit prior to the date it was withdrawn from location.

The decision of the Deputy Solicitor recites that the appellant Coleman admitted that he had made no profit on his rock sales. The testimony given by the Government's mineral examiner and a producer and distributor of stone was also found to constitute a prima facie showing of invalidity. The burden of showing by a preponderance of the evidence that each of his claim was validated by a discovery of a valuable mineral deposit within its boundaries was held to be upon the appellants.

It was the conclusion of the Deputy Solicitor that the evidence presented on all pertinent factors did not support a conclusion that prior to July 23, 1955, the deposit upon which the claim of discovery was based could have been mined, removed



and disposed of at a profit. Consequently, all of the subject mining claims were held to be null and void. The earlier decisions had declared that work had been done in good faith and that there was established a limited market as to four or five of the claims. The appellants did not seek to obtain judicial review of this decision.

The United States, on August 8, 1963, filed a complaint seeking the ejectment of the appellants from their invalid mining claims and damages, to which the appellants filed an answer and counterclaim alleging that all the claims were valid and asking issuance of a patent. The United States, on July 16, 1964, filed a motion for summary judgment on the issue of ejectment only and for dismissal of the counterclaim. Appellants, on August 18, 1964, filed a statement of genuine issues necessary to be litigated and an answer and opposition to the plaintiff's motion for summary judgment. A reply memorandum to the appellants' statement of genuine issues was filed by the United States on August 19, 1964. An opposition to the United States' motion to

strike portions of defendants' answer and opposition to plaintiff's motion for summary judgment was filed August 20, 1964.

The district court, by order entered December 7, 1964, denied the United States' motion for summary judgment and dismissal of the counterclaim. This was done on the basis of the appellants' assertion at the argument that the Department of the Interior has secret instructions or regulations regarding cases such as this. The district court stated that the "Plaintiffs' failure to meet this assertion leaves a question of fact before the court which precludes a summary judgment at this time. The United States filed on January 13, 1965, a motion for resubmission of their motion for summary judgment on the issue of ejectment only and for dismissal of the counterclaim which had previously been filed on July 16, 1964. Supporting this motion was an affidavit of an official of the Department of the Interior to the effect that there were no secret instructions or regulations of any kind affecting the action taken in mining contest cases generally or in this case. The certified record of the administrative proceedings in the subject contest had been lodged with the court on July 16, 1964.

On January 25, 1965, the appellants filed an answer and opposition to the motion for resubmission filed by the United States. The United States filed a reply to this answer on January 28, 1965. Appellants filed a further answer and opposition to the United States' motion on February 5, 1965.

On February 26, 1965, the district court, after hearing oral argument and considering the files, records and evidence in the case, "including the entire certified record of the administrative proceedings, here lodged with the Court \* \* \*," found that the United States had the right to have judgment summarily entered in its behalf as a matter of law.<sup>1/</sup> The district court declared the United States to be the sole owner of all right, title and interest in the lands which are the subject of this suit. The appellants' counterclaim was also dismissed. On March 5, 1965, the appellants filed a motion to amend or alter judgment, together with a motion for a new trial.

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1/ The files, especially defendants' "Further Answer and Opposition to Plaintiff's Motion For Re-Submission of Motion for Summary Judgment" show that this alleged secret regulation is simply another form of the argument which this Court rejected in Adams v. United States, 318 F.2d 861 (1963), that the standard for validation of mining claims set out in Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959), was erroneous. See also Henrikson v. Udall, 350 F.2d 949 (C.A. 9, 1965).



The United States filed oppositions to the appellants' motions on March 12, 1965, which were replied to by the appellant on March 19, 1965. On May 12, 1965, final judgment was entered in favor of the United States. The provisions of this judgment incorporated the provisions of the previously entered judgment on the issue of ejectment and awarded as damages the sum of \$1,877.50. Notice of appeal was filed on June 3, 1965.

### SUMMARY OF ARGUMENT

The Secretary of the Interior, in matters relating to the public domain, is charged by Congress with the responsibility of seeing that rights in the public lands of the United States are acquired in accordance with the statutory provisions which provide for their disposal. The disposal of public lands is not a subject over which the "judicial power" of the United States is extended. It is a field in which the authority of Congress is supreme.

The Department's decision, holding the appellants' mining claims to be null and void, was in accord with established

law. The requirement of present marketability as related to common variety minerals is clearly in accord with decisions of the Secretary and the courts. The fact findings of the Department are supported by the record and are conclusive.

There is nothing here which suggests that the requirements of due process have not been complied with. Moreover, since a direct review of the Secretary's decision would have been confined to a review of the administrative record no broader review is permitted by bringing a collateral attack on the Department's decision in ejectment proceedings.

This case was properly disposed of by summary judgment.



## ARGUMENT

### APPELLANTS' ATTACKS UPON THE DEPARTMENTAL DECISION INVALIDATING THEIR MINING CLAIMS LACK MERIT

In order to obtain possession of its property the United States instituted this action to eject the appellants from certain mining claims which had been determined by the Secretary of the Interior to be invalid. The Secretary's determination that the appellants' mining claims were invalid was challenged by the appellants in opposing the ejectment proceeding. Except for such challenge, the United States plainly was entitled to possession of its property. United States v. Langendorf, 322 F.2d 25 (C.A. 9, 1963); Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965).

A. The decision declaring the appellants' mining claims to be invalid was within the Secretary's jurisdiction. - The basic case of Cameron v. United States, 252 U.S. 450, 459-460 (1920), dealing with mining claims, declares:

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. (Citations omitted.)

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void.

This Court spelled out the function of the Secretary, involving an alleged grant to a state, in Standard Oil Co. of California v. United States, 107 F.2d 402, 409-410 (1940), cert. den., 309 U.S. 654, as follows:

The disposal of the public lands is not a subject over which the "judicial power" of the United States is extended. It is a field in which the authority of the Congress is supreme. Lee v. Johnson, 116 U.S. 48, 6 S.Ct. 249, 29 L. Ed. 570; Art. IV, sec. 3, clause 2, of the Constitution, U.S.C.A. Where Congress grants public lands to a state, reserving those known to



be mineral as of the approval of the survey, it is thought that there is no constitutional impediment to its delegating to any instrumentality it may select the authority of determining, as a fact, what lands fall within the excluded class. Compare *Shields v. Utah & Idaho R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111. The state or its transferees obviously have no constitutional right to demand the property on terms differing from those imposed. Their claim to the land does not derive from the Constitution. Nor is the power of Congress, under the broad authorization of that document, so limited as to require the fact-finding agency to make its determination at or prior to the approval of survey.

The problem, then, as we understand it, is not what authority Congress may confer upon the Secretary, but what authority it has conferred in relation to the administration of this grant. If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition. The holdings to this effect are too numerous for citation, but among those apposite are *Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 15 S.Ct. 779, 39 L.Ed. 931; *Cameron v. United States*, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659; *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 26 L.Ed. 875; *Wright v. Roseberry*, 121 U.S. 488, 7 S.Ct. 985, 30 L.Ed. 1039; *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527; *Johnson v. Drew*, 171 U.S. 93, 99, 18 S.Ct. 800, 43 L.Ed. 88.

Jurisdiction of the Department to determine the validity of appellants' mining claims is plain.

B. The Department's decision declaring the subject mining claims null and void was in accord with established law. - The rule is well established that, under the mining laws of the United States, the discovery of a "valuable" mineral deposit within the limits of each claim is essential to a valid location. Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Mining Company, 371 U.S. 334 (1963); Adams v. United States, 318 F.2d 861 (C.A. 9, 1963); Davis v. Nelson, 329 F.2d 840 (C.A. 9, 1964).

It was necessary for the appellants to establish that a discovery had been made of a "valuable" mineral, i.e., stone, within the boundaries of each mining claim prior to July 23, 1955, in order for the claims to be valid locations. After that date, common varieties of sand, gravel and stone could not provide the mineral basis for a valid claim. Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. secs. 601, 611 (supra, p. 3). Since the general mining laws relate only to "land valuable for minerals" (30



U.S.C. sec. 21), or which have "valuable mineral deposits" thereon (30 U.S.C. sec. 22), the burden was on the locator in this instance of showing the existence of a valid discovery of stone within the limits of the subject claims prior to the date that they ceased to be locatable minerals. Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959).

The test to be applied in determining whether minerals are valuable within the meaning of the mining laws of the United States was recently pointed out in Best v. Humboldt Mining Company, 371 U.S. 334, 335-336 (1963), and this Court expressed it in Adams v. United States, 318 F.2d 861, 870 (1963), as follows:

The showing which must be made with respect to value in order to establish a valid claim, as stated in Castle v. Womble, 19 L.D. 455, 457, and thereafter given recognition by the Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322, 25 S.Ct. 468, 470, 49 L.Ed. 770, is as follows:

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. \* \* \*"



The appellants herein have argued that there has been retroactively applied a new concept in determining the validity of a discovery. This is not so. The question still remains whether "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." It cannot be denied that the cost of extraction, which is but one element limiting profit, is relevant to determining whether "a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed." Adams v. United States, 318 F.2d 861, 870 (C.A. 9, 1963). This Court again affirmed this standard in Henrikson v. Udall, 350 F.2d 949 (1965). Indeed, it is difficult to see how a reasonably prudent man could have such an expectation without considering whether the mineral could be marketed at a profit. To hold otherwise would permit the establishment of rights in the public domain without any reasonable prospect of development, which would be contrary to the stated purposes of the mining laws. Those laws do not contemplate private "banking" of lands for future development and for use of the mining laws as a subterfuge to get title and use the lands for other purposes.

The requirement of present marketability as related to common variety minerals is clearly in accord with the rule announced in Castle v. Womble, 19 I.D. 455 (1894). It is obvious that a person of ordinary prudence would not be justified in the further expenditure of his labor and means in developing a source of stone where there was no present market for the amount claimed and the cost of removal exceeded the return from its sale. In Foster v. Seaton, 271 F.2d 836, 838 (C.A. D.C. 1959), the court stated:

With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956). \* \*

In this case, the burden of proof was on the appellants to show the existence of a valuable mineral discovery within the limits of their mining claims. Foster v. Seaton, 271 F.2d 836, 838 (C.A. D.C. 1959). This they failed to do.

C. The Department's findings of fact are supported by the record and are conclusive. - A review of the record of this case clearly shows that the appellants failed in their burden of showing that they had made a valid discovery on the subject mining claims prior to July 23, 1955. The Secretary, after reviewing the administrative record, found that the appellant, Mr. Coleman, had admitted that he had made no profit on his sales of rock. He also found that there was a great disparity between the mineral claimants' estimate of the value of the mineral actually marketed from the claims and the cost of doing so, which also indicated the absence of any element of profit. In addition, there was the testimony of the Government's mineral examiner, describing an examination of the claims in Coleman's company and his sales records, and that of a producer and distributor of stone products, describing the market for stone in the



area. This testimony of the United States' witnesses, the Department found was sufficient to constitute a prima facie showing of invalidity of all of the appellants' claims.

But, apart from the supporting evidence, whether there has been the requisite discovery of a valuable mineral within the limits of the subject mining claims is a question of fact, the decision of which by the Secretary of the Interior, or his authorized representative, is conclusive in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Company, 371 U.S. 334, 335-336 (1963); Standard Oil Co. of California v. United States, 107 F.2d 402 (1940).

This Court in Standard Oil Co. of California v. United States, supra, an analogous situation to the present action, fully treated the issue presented by this appeal. The United States, in that case, had instituted a suit to quiet title to certain lands on the basis of a factual determination which had been made by the Secretary of the Interior. The Secretary had determined

that certain lands were known to have been valuable for minerals at the date of their survey and that, as such, title had not passed to the state with a grant of public lands. This Court, after holding the Department to be conclusive as above quoted (p. 14), further held (107 F.2d at p. 410):

Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises must be exercised within the limits of due process, that is, after notice and hearing and upon evidence. *Cameron v. United States*, supra; *Crowell v. Benson*, supra; *Shields v. Utah & Idaho R. Co.*, supra. Compare *Iron Silver M. Co. v. Campbell*, 135 U.S. 286, 10 S.Ct. 765, 34 L.Ed. 155. But there is here no question of due process. Appellants participated in the proceeding before the department and make no complaint that they were not accorded full opportunity to present their evidence.

In *Cameron v. United States*, 252 U.S. 450 (1920), which was an action brought by the United States to enjoin a mining claimant from occupying a tract of land under a claimed mining location, the <sup>COURT</sup> held (p. 464):

Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the



Interior was conclusive in the absence of fraud or imposition, \* \* \*. [Citations omitted.] Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below.

The departmental decision in this instance, was on a factual question and is the same type of situation as was presented in Cameron. There has been no allegation of fraud made in this case. Appellants presented all the evidence they desired. No mention of procedural due process appears. As noted in the Statement, supra, p. 8, their claim of "secret instructions" was another of their refusals to accept the standards approved in Adams and Foster. There is no relevant distinction which can be made between this case and Cameron.

The appellants' challenge of the departmental decision in this action is similar to a collateral attack being made on a judgment. Instead of bringing an action in the nature of mandamus in the local district court under 28 U.S.C. sec. 1361,

supra, to review the decision, the appellants took no action to challenge in the courts the determination that their mining claims were null and void. Instead, over a year after the decision, the United States was compelled to bring this suit to make the decision effective. The mandamus review, which the appellants did not avail themselves of, is that "direct review" referred to by this Court in Adams v. United States, 318 F.2d 61 (1963). This Court stated at p. 867:

Indeed, in a court proceeding other than a direct review, the district court function would probably be more limited. See, for example, Cameron v. United States, 252 U.S. 450, 464, \* \* \*.

and in Henrikson v. Udall, 350 F.2d 949, 950 (1965), this Court briefly stated the standard of review in direct review proceedings to be followed:

It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed. [Citations omitted.]

D. Summary judgment was properly granted in this Court. - The appellants argue that a motion for summary judgment was not necessary in this case and that this should have been heard in the district court in a manner provided for in Section 1009 of the Administrative Procedure Act, Title 5 U.S.C., particularly sub-section (e). The simple answer to this argument is that the appellants did not pursue their remedy. The United States was required to institute this action due to the appellants' failure to seek review of the Deputy Solicitor's decision in the courts.

Even if the appellants were to have sought a review in the courts, they are not entitled to a review under the provisions of the Administrative Procedure Act. That Act was designed to affect administrative agencies whose functions are of a regulatory nature, unlike the Department of the Interior, which has long been charged with the care, management, and disposition of the public lands, including mineral lands, where the extent of private rights, if any, depends solely on grants from Congress.



See 2 Stat. 716, 5 U.S.C. sec. 485; 9 Stat. 395, 43 U.S.C. sec. 2; and 30 U.S.C. sec. 22; Best v. Humboldt Mining Company, 371 U.S. 334 (1963).

Decisions of the Secretary of the Interior with respect to public lands have historically been accorded a conclusiveness beyond that of typical regulatory agencies. Cameron v. United States, 252 U.S. 450, 464 (1920). See also Morgan v. Udall, 306 F.2d 799 (C.A. D.C. 1962), where the court stated with citations (p. 801): "It has long been established that the determination by the Secretary of a question of fact on a matter within his jurisdiction is well-nigh conclusive."

Nothing in the Administrative Procedure Act indicates an intention to narrow the broad powers of the Secretary of the Interior in public land matters or to enlarge the power of the courts in reviewing his decisions. To the contrary, the "plenary authority" of the Secretary in such matters was recently affirmed by the Supreme Court in Best v. Humboldt Mining Company, 371 U.S. 334 (1963), the Court stating at p. 336:

\* \* \* the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them.

After quoting from Cameron to demonstrate the Secretary's power to declare mining claims null and void, the Court, at page 338, expressed its views on hearings before the Department as follows:

"Due process in such case implies notice and a hearing. But this does not require that the hearing be in the courts, or forbid an inquiry and determination in the Land Department." Orchard v. Alexander, 157 U.S. 372, 383. If a patent has not issued, controversies over claims "should be solved by appeal to the land department and not to the courts." Brown v. Hitchcock, 173 U.S. 473, 477. And see Northern Pacific R. Co. v. McComas, 250 U.S. 387, 392.

As this Court again held in Henrikson v. Udall, 350 F.2d 949 (C.A. 9, 1965), direct review is confined to the administrator; hence, this case must be disposed of by summary judgment. See also Dredge Corporation v. Penny, 338 F.2d 456 (C.A. 9, 1964). Certainly no broader review is permitted in a collateral attack of the Department's decisions than in ejectment proceedings brought by the United States.



CONCLUSION

For the foregoing reasons, we submit that the judgment should be affirmed.

Respectfully submitted,

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JANUARY 1966

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
\_\_\_\_\_  
GEORGE R. HYDE  
Attorney, Department of Justice  
Washington, D. C., 20530

APPENDIX

UNITED STATES  
V.  
ALFRED COLEMAN

MAR 27 1962

A-28557

Decided

Mining Claims: Common Varieties of Minerals--Mining Claims: Discovery--

Mining Claims: Determination of Validity

To satisfy the requirement for a discovery on a building stone claim located before July 23, 1955, it must be shown that the exposed materials, a common variety of stone, appearing within the limits of a claim could have been extracted, removed, and marketed at a profit prior to that date, and where such a showing is not made the mining claim is properly declared null and void.



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
WASHINGTON 25, D. C.

A-28557

United States

v.

Alfred Coleman

: Contest No. 6833 (Los  
: Angeles); mineral patent  
: application, Los Angeles  
: 0137951.

: Placer mining claims held  
: valid in part and null and  
: void in part.

: Affirmed in part; reversed  
: in part.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred Coleman has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated June 22, 1960, which modified a hearing examiner's conclusion holding null and void 13 of the 18 placer mining claims and holding the remaining 5 claims to be valid. The Acting Director held an additional claim and 20 acres of another, null and void, thus sustaining the validity of only 3 claims and part of a fourth claim.

The claims, which comprise 720 acres situated in the dry bed of Baldwin Lake and on an adjoining steep mountain, are in the San Bernardino National Forest in California. They were located for quartzite which outcrops on all the claims and is thought to extend 1000 feet below the surface. The claims, designated as the Baldwin Lake Quarry Claims Nos. 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, and 20, were located and relocated in the



period 1949-1955. Application for patent was filed in January 1956, and on February 25, 1958, a contest was commenced on charges that the land in the claims is nonmineral; that minerals had not been found in sufficient quantities to constitute a valid discovery; and that \$500 had not been expended in improvements on claims 7, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19. A hearing was held on September 16, 1958.

At the hearing, Coleman testified that he had devoted all of his time and effort to development of the claims during the 10 years since the location. He said, however, he felt that proper development would require removal of rock from the top of the mountain downward and, therefore, he had devoted his efforts to the construction of a home which would permit him to live on one of the claims, to the development of sewage disposal facilities and a water supply for domestic use and for quarrying and processing operations at a later time, and to the building of roads to provide access to the higher claims. He used weathered rock fragments in the construction of his house and in fencing the area of the spring and for fill in the dwelling area. He sold an estimated 1000 tons over the 10-year period, but did not attempt to commence active quarrying operations although he installed some rock processing equipment. He said that he needed title to all of the claims to be able to provide a complete range of colors of ornamental rock for construction use and as security for loans that he might need.

in the future, as well as for proper development of the claims. He said he did not want to attempt extensive sales until he was fully equipped to offer a wide selection of colors and certain delivery. Shortly before the hearing, he entered into a lease permitting his <sup>lessee</sup> to process and dispose of sand, gravel and other severed rock products not including building stone. The lessee testified that he installed his own equipment and that he sold in excess of \$4000 worth of sand, gravel, lateral rock for septic tank leaching fields and fill material in the first 2½ months of operations under the lease.

Coleman did not controvert the charge that less than \$500 worth of work had been done on many of the claims, but he contended that the requirements of the mining laws had been met by the placing on some of the claims of extensive improvements which are of value to all of them. On cross examination, he gave what he termed as wild estimates of the value of the improvements placed on and of the materials removed from all of the claims. His total valuation for improvements on the 18 claims was \$17,200; for materials removed \$15,990. He admitted that the improvements on 11 of the claims did not exceed \$150 in value. He claimed \$1500 on 3 claims, \$4000 for roadwork on one claim, and \$6500 for his combined home, garage and shop on one of the claims. On the remaining 2 claims, he gave values of \$200 and \$750. He also admitted no removals of rock or rock products from 6 of the claims; removals valued at \$60 from one claim;



from \$100 to \$120 from 3 claims; \$240, \$250 and \$350 from 3 others; \$350, \$1500 (from each of 2 claims) and \$2000 from 4 more; and \$400 from one over the 10-year period.

The government's witnesses testified that there are large quantities of quartzite of various colors on the claims and in the area of 28,000 acres of which the claims are a part; that such rock can be used for construction purposes; that there is not a great demand for it because it is very heavy and, therefore, expensive to handle; that it splits unpredictably so that there is a great deal of waste which can be utilized for gravel only with considerable expense for crushing because of its hardness; and that it cannot be split into thin layers for facing and surfacing, which greatly increases the weight of the quantity of material required for covering a given area over the requirements for other accessible rock. Coleman's estimate of sales amounting to \$12,000 over a 10-year period was not questioned, nor his report of sales amounting to \$1025 in 1957, but a government's witness stated that he felt that the roads on the claims evidenced lesser values than Coleman claimed. He concluded that the possible demand for rock from the claims and the evident increasing difficulty of producing disposable rock as the more usable fractions are removed could not justify a prudent man in spending time and money with a reasonable chance of success in developing a valuable enterprise.

The hearing examiner summarized all of the evidence presented at the hearing, noting the very widespread occurrence of the stone claimed as a discovery, the limited potential market and the paucity of the claimant's sales. He concluded, however, that the Colemans <sup>1/</sup> had "established a limited market for the types of building stone found upon their claims" and had in good faith developed claims numbered 1, 4, 5, 8 and 10. He, therefore, declared these 5 claims validated by discovery and the 13 other claims null and void. On appeal, the Acting Director noted that Coleman's sales have not afforded him any recompense for his continuous labor over a 10-year period, but concluded that there is a market for a limited amount of building stone from 3 claims and a portion of one other claim that are most fully developed, and from which the bulk of his sales have been made, so that continued sales at the rate shown for the first 10 years of operations will produce a profit over and above the value of Coleman's labor in removing the stone from these claims. Accordingly, he approved the examiner's judgment as to a valid discovery on claims numbered 1, 5, 8 and the portion of No. 10 described as the  $N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$  of section 7, T. 2N., R. 2 E., S. B. M. He added claim No. 4 and the west one-half of claim No. 10 to the list of null and void claims.

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<sup>1/</sup> The contest was brought against Mr. and Mrs. Coleman but Mrs. Coleman died while the appeal was pending before the Director.

In its successive appeals from the validation of some of the claims, the Forest Service has contended that there has been no discovery of a valuable mineral deposit on any of them because of Coleman's inability to sell anything removed from the claims at a price which includes the reasonable value of his labor. It points out that because the claims are located in a national forest, the evidence of their validity should be clear and unequivocal, citing the Department's decision in United States v. Duvall, 65 I. D. 458, 661 (1958).

In his appeals, Coleman contends that the charges against his claims of nonmineral land and no discovery have no validity in view of the 720 acres of solid rock fully exposed to view and that his evidence of improvements shows clearly that sufficient expenditures have been made on some of the claims for the benefit of all of the claims. He urges that the charges be dropped and that the land office conclude the patent proceedings without further delay.

It is well-established that a mining claimant is entitled to a patent to his mining claim if he has made a discovery of a valuable mineral deposit within the limits of the claim (30 U. S. C., 1958 ed., secs. 23, 35). The act of August 4, 1892 (30 U. S. C., 1958 ed., sec. 161), expressly authorizes the location of mining claims for building stone. Therefore, it was essential in this contest that Coleman show that he has made a discovery of building stone within the limits of his claims. This Department held early



in the history of proceedings under the mining laws that a validating discovery is shown by reasonable evidence of a finding of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (Castle v. Womble, 19 L. D. 455 (1894)), and this standard has been sanctioned by the courts. Chrisman v. Miller, 197 U. S. 313 (1905); Cameron v. United States, 252 U. S. 450 (1920); Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). When the mineral claimed as a discovery is one of wide occurrence the Department has held that the characterization of a deposit of such material as a valuable mineral is dependent upon a showing that it can be extracted, removed and marketed at a profit. Layman et al. v. Ellis, 52 I. D. 714 (1929); United States v. Barngrover et al., 57 I. D. 533 (1942); see also Ikner v. Underwood, 141 F. 2d 546, 549 (D. C. Cir. 1944). To justify his possession of public land, the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, a deposit of materials such as building stone or sand and gravel is of such value that it can be processed, removed and disposed of at a profit. Solicitor's opinion, 54 I. D. 294, 296 (1933); United States v. Strauss et al., 59 I. D. 129 (1945); United States v. Foster et al., 65 I. D. 1 (1958), aff'd Foster et al. v. Seaton, supra. See also United States v. Estate of Hanny, 63 I. D. 369,

711 (1957); United States v. Blier, 64 I. D. 93, 96 (1957); United States v. Fife et al., A-28396 (September 19, 1960).

Furthermore, since the Congress withdrew common varieties of building stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U. S. C., 1958 ed., sec. 611), it was incumbent upon Coleman to show that all the requirements for discovery of a valuable mineral deposit, including a showing that these materials could have been extracted, removed, and marketed at a profit, had been met by that date. United States v. Fife, et al., (*supra*).

In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a "common variety" within the meaning of the act.

It is very clear that Coleman did not make the showing required as to the undeveloped claims which the Acting Director declared to be null and void. Whether expenditures for improvements on other claims may or may not be credited to these claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims in 1955 or even in 1958 when the hearing was held. Coleman presented evidence of sales from the four claims, upon which the bulk of his improvements were placed. However, he admitted that he did not make any profit on his rock sales. He testified to estimated removals of rock, not all of which was sold, valued at \$15,990. He also testified to labor on the claims (more than 3000 days from 12 to 18 hours in length at



\$3.50 per hour) of the value of at least \$157,500. (Tr. 116, 117.)<sup>2/</sup>

It is not clear that his estimate of the value of his labor included the costs of obtaining and operating the equipment by which it was accomplished; in the absence of an explanation it is reasonable to assume that \$3.50 per hour was not intended to cover the use of trucks, bulldozer and blasting equipment. But even if it were possible to amortize the costs of acquiring his heavy equipment, the great disparity between his own estimate of the value of the mineral actually marketed from the claims and the costs of doing so indicates the absence of any element of profit.

The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. The testimony of the government's mineral examiner, describing an examination of the claims in Coleman's company and of his sales records, and that of a producer and distributor of stone products, describing the market for rock and stone in southern California, are sufficient to constitute a prima facie showing of invalidity. The burden was upon Coleman to show by a preponderance of the evidence that each of his claims was validated by a discovery of a valuable mineral deposit within its boundaries. Foster v. Seaton, supra. He was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23,

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<sup>2/</sup> This reference is to the pages of the transcript of the testimony offered at the hearing.

1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit. See United States v. Philip Jungert, A-28199 (April 14, 1960); United States v. Jacobo Armenta et al., A-28248 (June 22, 1960). I am unable to find evidence which supports such conclusion as to any of the claims.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director is affirmed in so far as that decision held 14 $\frac{1}{2}$  of Coleman's Baldwin Lake quarry mining claims null and void and reversed in so far as it held 3 $\frac{1}{2}$  of his claims validated by discovery. All of the Baldwin Lake quarry placer mining claims are hereby held to be null and void.

*Edmond W. Fisher*

DEPUTY Solicitor

N O. 2 0 2 2 7  
IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ALFRED COLEMAN, et al.,  
Appellants,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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APPELLANTS' CLOSING BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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FILED

FEB 7 1966

WM. B. LUCK, CLERK

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N O. 2 0 2 2 7

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Letter of January 8, 1957 to Mr. George W. Nilsson, Secretary Mining Association of Southern California, from Clair Engle, Chairman, Committee on Interior and Insular Affairs.



## APPENDIX (Continued):

Letter of October 11, 1957 to Mr. George W. Nilsson, from Max Caplan, For the Director, United States Department of the Interior, Bureau of Land Management, Washington 25, D. C.

Letter of December 13, 1957 to Mr. George W. Nilsson, from Ernest F. Hom, Assistant Solicitor, Land Appeals, United States Department of the Interior, Office of the Solicitor, Washington 25, D. C.

Letter of February 9, 1959 to Mr. Lionel Richman, from W. L. Shafer, For the Director, United States Department of the Interior, Bureau of Land Management, Washington 25, D. C.





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N O. 2 0 2 2 7

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APPELLANTS' CLOSING BRIEF

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I

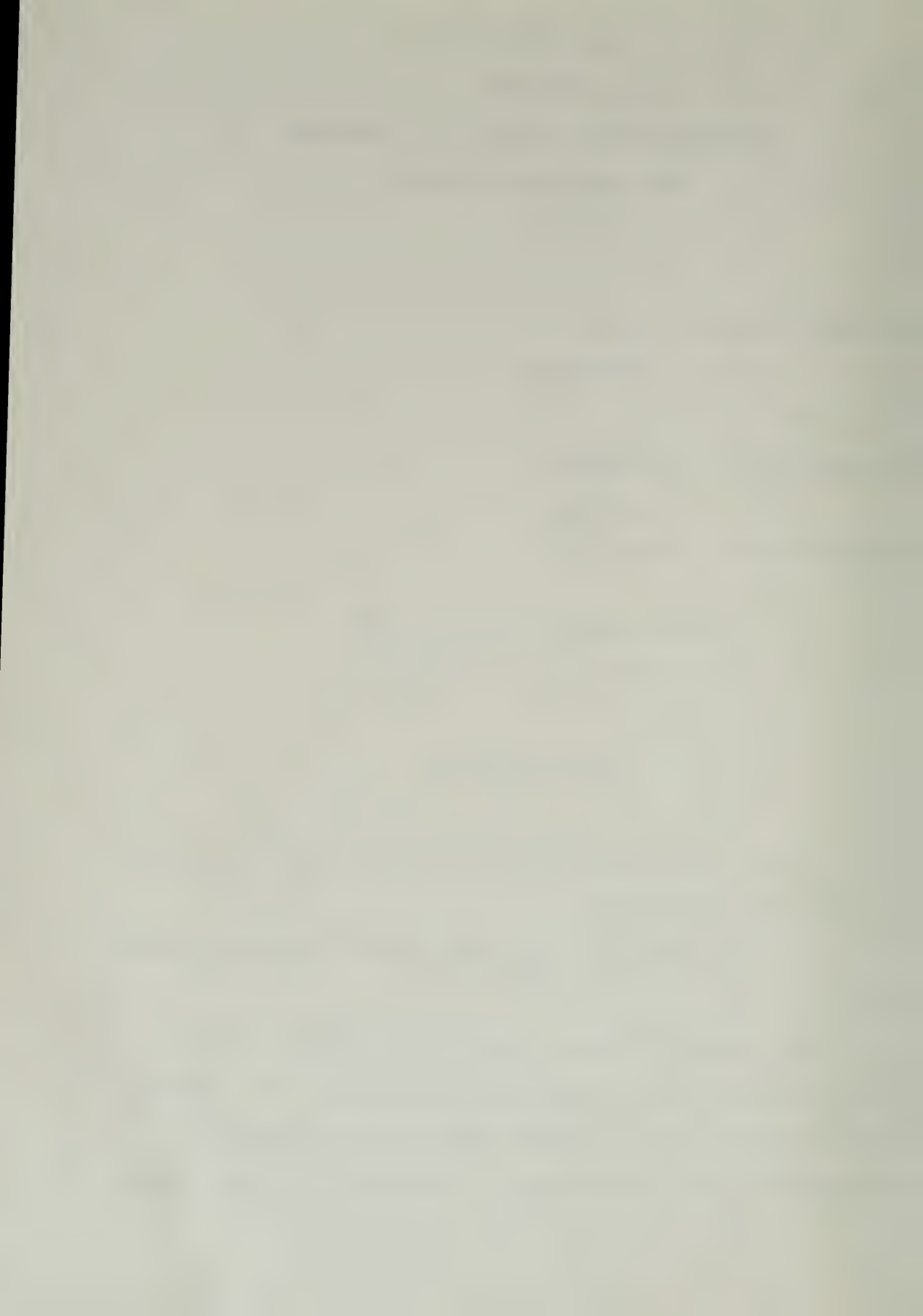
INTRODUCTION

A study of the Appellee's brief herein indicates a number of fundamental weaknesses.

1. It fails to meet the points made in plaintiffs' opening brief.

For instance, the government entirely ignores the appellants' discussion in Section II, beginning on page 5 of our opening brief, in which the three charges contained in the Complaint in Contest filed by the United States are discussed. It is there shown





that none of the three charges were proved, but on the contrary each of the three charges were disproved, both by the evidence of the United States and the evidence of the Appellant Coleman.

2. While the government admits that Congress is the only authority to pass legislation concerning the disposal of the public domain, including location of mining claims (see quotation from the Standard Oil Company of California v. United States, on page 13 of appellee's brief), nevertheless the Department of the Interior and its attorneys in the brief either ignore or actually violate the laws passed by Congress involving the location and patenting of mining claims herein involved.

Both of these failures will be discussed at length later in this closing brief.

## II

### CONGRESS AND PUBLIC LAND LAWS

On page 13 of the appellee's brief there is a quotation from the case of Standard Oil Company of California v. United States, 309 U.S. 654:

"The disposal of public lands . . . is a field in which the authority of the Congress is supreme. . . . "

This, of course, cannot be questioned, because this power is given to Congress in Article IV, Section 3, Clause 2 of the Constitution of the United States.

We are delighted that the Department of the Interior and the Attorney General's office, which represents the Department,



recognize this fact, because this is what we have been contending all the way through this case, as will be seen from the various briefs filed in the District Court in opposing the Motion For Summary Judgment and its resubmission, and in our opening brief.

However, the Department of the Interior has not adhered to this constitutional provision, but on the other hand has disregarded and violated the various Acts of Congress passed for the benefit of citizens who wish to locate mining claims and secure mineral patent therefor.

1. The mining law of 1872.

(a) In our opening brief we quote from a speech made by H. R. Hochmuth, then Associate Director of the Bureau of Land Management, Department of the Interior, which he delivered on July 17, 1964, addressing the Tenth Annual Meeting of the Rocky Mountain Mineral Law Institute at Salt Lake City (see pages 29, 30 and the bottom of page 32; and again we quote from the speech on pages 43 and 44).

A complete copy of the speech is attached as "Exhibit A" to defendants' Answer in Opposition to Motion For Resubmission of Plaintiff's Motion For Summary Judgment. This exhibit is numbered pages 180 to 182 of the Clerk's Transcript herein.

(b) The appellants' mining claims were located on lands suitable for building stone under Section 161 of the Mining Law, which is both quoted and referred to in our opening brief. This section has been ignored by the Department of the Interior, and in its final decision such stone is called "common variety" under the





1955 law, although, as we shall point out, there is no limitation in Section 161 which can be construed to make a large deposit of building stone a "common variety".

## 2. Administrative Procedure Act.

This Act is discussed at some length under our Section VI, beginning at page 41, of our opening brief. We have pointed out how the Act has been disregarded by the Department of the Interior. In the appellee's brief it is blithely waived aside at page 24 of that brief.

### III

#### SCOPE OF THE ADMINISTRATIVE PROCEDURE ACT

First of all, there appears to be a misunderstanding on the part of the appellee as to the type of procedure being pursued by the appellant under the Administrative Procedure Act. For instance, on page 22 of appellee's brief it is referred to as "a collateral attack". Perhaps this may not make much difference, but the fact is that Congress specifically authorized judicial review by the Administrative Procedure Act, which we have discussed in our argument in Section VI of our opening brief.

Our right to file a counterclaim seeking such judicial review was approved in Adams v. United States, 318 F.2d 861 (1963), which case is cited several times in the appellee's brief.

In the Adams case, as in ours, Adams, the mining claimant, as we did, filed a counterclaim to the government's Motion For Summary Judgment. At page 867(5) the Court says in the Adams case:



"In our opinion this new case, like its predecessor, is essentially one to review the agency action. The review provisions of the Administrative Procedure Act are therefore as applicable here as they were in the early case."

Again, at page 866(4), after stating the authority of the Department of the Interior, this Court says:

" . . . such determination being subject to judicial review." (Citing cases).

In connection with the scope of judicial review, the appellee quotes from two old cases: Cameron v. United States, decided in 1920, and Standard Oil Company of California v. United States, decided in 1940. From the latter, on page 13 of the brief, is this quotation:

"The disposal of public land is not a subject over which the 'judicial power' of the United States is extended. It is a field in which the authority of the Congress is supreme. . . ."

As to judicial review this, of course, is only partly true. See Boesche v. Udall, 373 U.S. 472, decided in 1963, cited by appellee. The Supreme Court said at the end of that decision:

"In so holding we do not open the door to administrative abuses . . . and final action by the Secretary, see 43 C.F.R. Par. 221.37, has always been subject to judicial review. 30 U.S.C. (Supp. IV 1963) par. 226-2, . . ."

(Citing cases; emphasis added).



However, Congress in exercising its power over the public domain on June 11, 1946, passed the Administrative Procedure Act which gave the courts the power to review acts of the various administrative tribunals. We have discussed this at length in our opening brief, under Section VI.

On page 24 of its brief the appellee says, in the second paragraph, that the Administrative Procedure Act does not apply to the Department of the Interior. How dare appellee take such a position?

This, of course, is not correct. We again refer to this Court's decision in Adams v. United States, and also call the attention of the Court to a decision by Secretary of the Interior Seaton on September 28, 1956, in the case of United States v. O'Leary, 63 I. D. 341, at page 345. Secretary Seaton said:

"Inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing. In accordance with those decisions, the Department concludes that the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of





mining claims. "

It will be noted that for ten years, from 1946 to 1956, employees of the Department of the Interior refused to be bound by the Administrative Procedure Act passed by Congress. There is nothing in the Act which excludes the Department of the Interior.

After Secretary Seaton had issued his decision in O'Leary, 63 I. D. 341 at page 345, a press release was issued on October 12, 1956, announcing that in the future all contest hearings conducted by the Bureau of Land Management would be governed by the provisions of the Administrative Procedure Act.

Unfortunately we cannot find a copy of the press release, but we do attach as an Exhibit, in the appendix hereto, a copy of a letter from the office of the Solicitor of the Department of the Interior dated December 13, 1957, signed by Ernest F. Hom, Assistant Solicitor, Land Office, which refers to the press release and the purpose of it, which is " . . . announcing that in the future all contest hearings conducted by the Bureau of Land Management would be governed by the provisions of the Administrative Procedure Act. "

Even with the above decision, the employees of the Department of the Interior did not wish to be bound by the Administrative Procedure Act, and the decision of Secretary Seaton.

In another case in which the writer of this brief was involved, an employee of the Department, in order to emasculate the decision of



the Secretary of the Interior, said:

"While the Secretary so stated, the decision should not be so broadly read."

When Congress, in order to give more protection to the public, passed Public Law 87-748 on October 5, 1962, so that the dissatisfied citizen could sue in the home district, then the Department began using summary judgment to cut off, as far as possible, the remedy of the dissatisfied citizen to have judicial review to see that his rights were protected against the arbitrary and capricious acts of the Department, and the abuse of discretion by the Department.

#### IV

#### COMMON VARIETIES

As pointed out in our opening brief, since the Coleman mining claims were all located years before the Surface Use Act of July 23, 1955, was passed, the use of that 1955 law was improper. See Section VII of our opening brief, beginning at page 45 thereof.

As we pointed out, an examination of the above law, known as Public Law 84-167, will show that eight times the phrase "hereafter located" is used in connection with mining claims affected by said law. Then at the bottom of page 45 we quote the final section of the law, Section 615.

From this it should be perfectly clear that any common sense reading of the law will show that it does not apply, and should not be applied, to mining claims located prior to the passage of the law, especially such as Mr. Coleman's claims, most of which were located in the years 1949 and 1951; one being located in 1950 and one in 1952.





In addition, of course Section 161 of the Mining Law is not, and cannot be, brought within the Surface Use Act of 1955, because the Congress of the United States has defined the use of the materials covered by Mr. Coleman's mining claims, to-wit: building stone.

Since the decision of the Department turns principally on the statement that the building stone located by Mr. Coleman is a common variety because it is widely dispersed, let us take a common sense look at the term "common varieties".

Following is Section 3 of Public Law 84-167:

"A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common Varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more. "

In other words, if we have a deposit of sand or gravel either 20 acres or 1000 acres, which is valuable for gold, the size of the deposit makes no difference.



Thereafter, under date of October 4, 1956, the Department of the Interior issued regulations in connection with Public Law 84-167 of 1955, entitled "Circular 1961".

In other words, the 1955 law refers to the quality of the material. There is nothing said that it shall apply to minerals which are widely dispersed.

Therefore, the decision that widely dispersed minerals are "common varieties" is contrary to law.

Since Mr. Coleman's 18 placer mining claims are all covered with building stone, Public Law 84-167, passed July 23, 1955, does not, and cannot, affect the Coleman mining claims, and the decision of the Department, which used this law illegally to arrive at the conclusion that his claims were illegal, is void and of no effect.

Furthermore, to show that the 1955 law has no bearing on the validity of Mr. Coleman's mining claims, we are attaching the following documents to this brief as exhibits in the appendix hereof:

A letter from Hon. Clair Engle, Member of Congress, to Secretary Seaton, then Secretary of the Interior. At the time the 1955 law was passed, and also on January 2, 1957, Hon. Clair Engle was Chairman of the Interior and Insular Affairs Committee of the House of Representatives. This letter, and the exhibit attached thereto, and the letter of transmittal to George W. Nilsson, are all attached as Exhibits to defendants' answer in opposition to plaintiff's motion for summary judgment. This pleading is found on page 61 of the record sent by the Clerk of the District Court, and the exhibits appear on pages 84 to 89 of the record.



In addition to the letter from Congressman Engle to the Secretary, we attach as exhibits in the appendix two letters from the office of the Bureau of Land Management:

(a) A letter dated October 11, 1957, consisting of one page, signed by Max Caplan "for the Director". This letter specifically shows that common variety of stone is such as is used for road surfacing, fill or ballast. He then goes on to say in the last paragraph:

" . . . Stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, or stone suitable for monumental work would not be considered common varieties. "

(b) A letter dated February 29, 1959, addressed to Mr. Lionel Richman, consisting of two pages. This is signed by William Shafer "for the Director". His definition is substantially the same as that quoted above from Mr. Caplan's letter.

In the light of all of this record, by what legerdemain the Deputy Solicitor, or any other employee of the Department of the Interior, can change building stone into a "common variety" is beyond comprehension.

To sustain our position that the mineral located by Mr. Coleman as building stone is not a common variety, we call the Court's attention to a number of photographs filed as exhibits in the District Court. These are part of an affidavit made by Alfred Coleman in support of our opposition to plaintiff's motion for summary judgment. The affidavit begins on page 95 of the Clerk's record furnished by the Clerk of the District Court. The pictures appear on pages 107 to 116 of the





Clerk's record. There are color photographs on pages 111, 114, 115 and 116. These show the type of stone and a part of them show buildings which have used that stone. For instance, practically the whole building of the Bank of America located at Lake Arrowhead is built of the Coleman stone, and this is shown in a series of photographs. There is also a photograph of the face of a fireplace, and there are pictures of piles of this stone.

## V

### FOSTER v. SEATON ANALYZED

The decision in Foster v. Seaton is cited a number of times in the appellee's brief and for some time has been heavily relied upon by the Department to sustain its illegal use of the 1955 Surface Use Act (P. L. 84-167). There are several reasons why this decision is not an authority in mining cases.

1. The case was decided by the Court of Appeals of the District of Columbia on October 22, 1959, 271 F.2d, 836. It is clear that the Court in Washington was not familiar with mining matters. At that time the only place that a dissatisfied owner of mining claims could file a suit under the Administrative Procedure Act was in the United States District Court in Washington, D. C. , and appeal to the Court of Appeals there.

In addition to the fact that the Washington, D. C. courts were not familiar with mining, most mining claim owners did not have the funds to go there. Therefore, Public Law 87-748, Section 1391, Title 28 U. S. Code was passed October 5, 1962, under which suit may be brought in the United States District Court in the district in



which the mining claims are located.

2. The court in the Foster v. Seaton decision divides minerals into two classes in the following language:

"With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. . . .". (Emphasis added.)

Of course, there is nothing in the Mining Law authorizing the Department to make such a division. The only two kinds of location in the Mining Law are Lode and Placer. Therefore, this division into two types of minerals by the Washington Court is entirely without foundation.

3. The Washington, D. C. Court of Appeals, in support of its division of minerals into two kinds, relies on two decisions by the Department of the Interior. The first one is Layman v. Ellis, 54 I. D. 294 (decided in 1933).

An examination of the Layman-Ellis decision shows that it does not involve discovery; neither does it divide minerals into two kinds.

The case is entitled and involves: ". . . taking of sand and gravel from public lands for Federal Aid Highways". The facts in the case are that the State Highway Department of New Mexico was taking gravel from Federal lands for use in building highways. There is no





question of discovery.

The second case on which that Court of Appeals relies is United States v. Estate of Victor E. Hanny, 63 I. D. 369 (decided in 1956). This case does not support the decision of the Court of Appeals in Foster v. Seaton because in the Hanny case there was no question of discovery. Discovery was admitted.

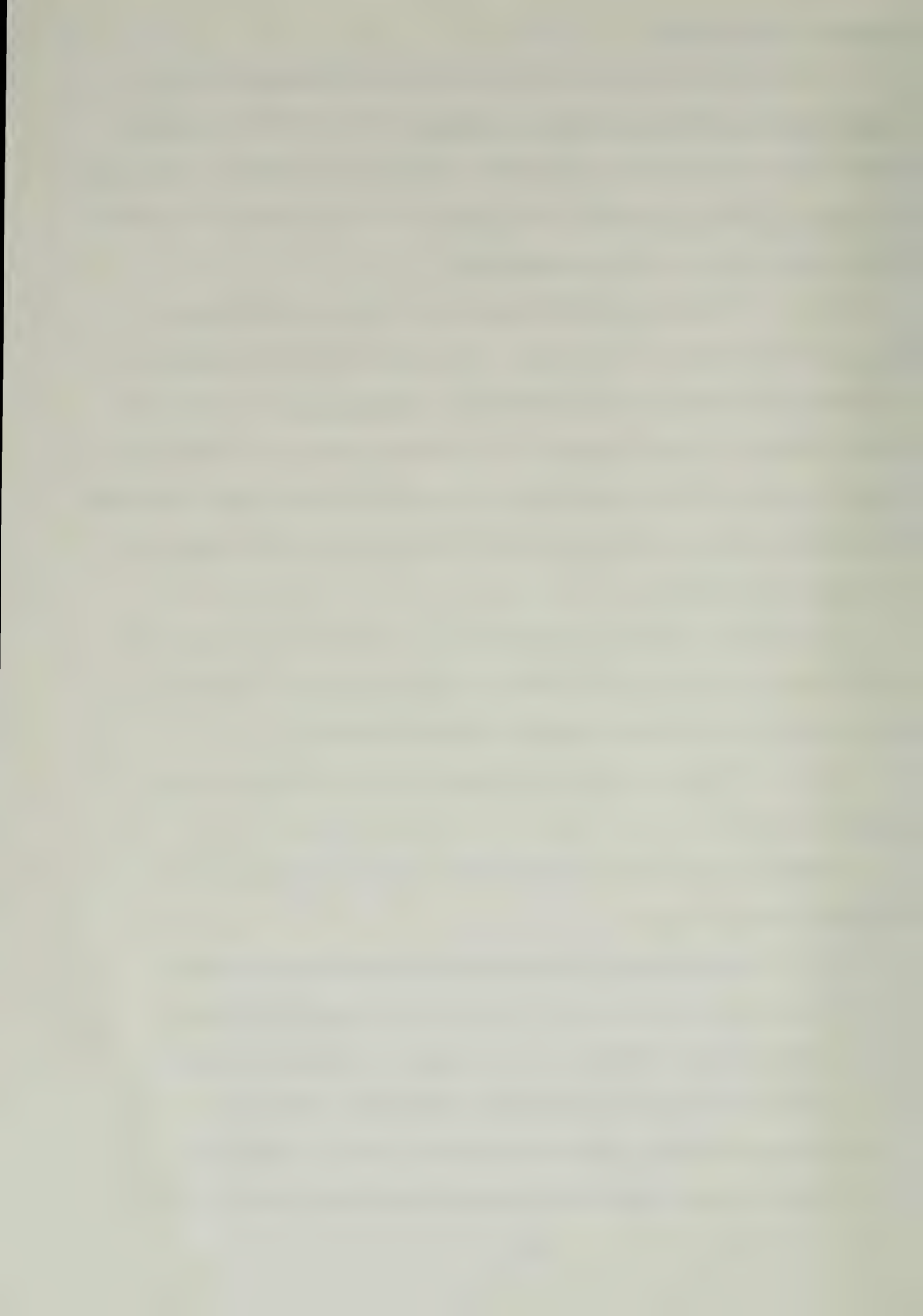
4. There is another reason why the case of Foster v. Seaton is not authority in our case. An examination of the decision will show that there is no provision in the Mining Law cited by the Court in support of its division of the minerals into two classes. Of course, none could have been cited because there is no such provision in the Mining Law, and nothing in the Mining Law can be construed to support that decision.

It will also be noticed that there are no Court decisions cited by the Court of Appeals of the District of Columbia to support its novel decision of dividing minerals into two classes.

5. There is a further reason why the decision is not applicable here.

The decision refers only to sand and gravel because the Court specifically says:

" . . . with respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present market-ability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining . . . "



Even if the decision were correct as to sand and gravel, it could have no bearing here because a look at the photographs submitted in the Trial Court, attached to an affidavit by the Appellant, Alfred Coleman (see pages 107 to 116 inclusive of the Clerk's Transcript), would show it cannot apply to building stone.

In addition, there was never any question raised by the Government that Mr. Coleman was "seeking to acquire such lands for purposes other than mining". It is clear from looking at the photographs that the land is practically solid stone and could not be used for any purpose but mining of building stone.

6. As to sand and gravel, if there is gold in the sand, the decision is incorrect, because if a "wide spread" deposit of sand and gravel contains gold, or any other mineral, it is not a common variety.

## VI

### BURDEN OF PROOF

1. The question of burden of proof raised by the Appellee in its brief is really academic in our case, because all of the relevant evidence supported Mr. Coleman and the fact that the 18 placer mining claims located by him were, and are, valid. This was discussed in our Opening Brief.

The failure of the government to prove any of the charges of its complaint in contest was discussed in our Opening Brief on pages 5 to 11, inclusive. At that time we also pointed out that in the final decision by the Deputy Solicitor he ignores these three charges, and said that the only question was the lack of profit which, of course, was not alleged as one of the charges in contest.



While it is true that the Department of the Interior has taken the position for a long time that the burden of proof is on the defendant in a contest filed by the Department, such a position is contrary to basic pleading and is wrong, especially where the powerful government is the plaintiff.

It is a fundamental of American jurisprudence that a man is innocent until he is proved guilty. In other words, the prosecution has to prove the man guilty. He does not have to prove his innocence.

Certainly if that is true in criminal matters, it should be true in civil matters. Since the location of a mining claim is authorized by Congress, and since a mining claim is presumed to be valid until proved invalid, the burden of proving such invalidity is upon the Department of the Interior.

It is a fundamental rule of law that violation of the law is not presumed.

It is true that the Department has taken the opposite position, which is contrary to the general rules of mining law, such as that the mining laws must be liberally construed. This improper position as to the burden of proof taken by the Department of the Interior is one of the reasons for the passage of the Administrative Procedure Act.

Section 1006(c) of the Administrative Procedure Act provides that the burden of proof is on the proponent. The proponent here is the United States, which was the plaintiff in the Complaint in Contest. If the Administrative Procedure Act concurred with the Department of the Interior that the burden of proof was on the mining claim locator, there would have been no need for this particular provision. It would





be surplusage.

The Department of the Interior interprets this provision of Section 1006(c) of the Administrative Procedure Act by stating that when it files a contest, the mining claim owner is the proponent, although he is named in the Complaint in Contest as the contestee (defendant). By what legerdemain this can be stated we do not understand.

2. That the burden of proof should be on the government is clear, because the mining claim is presumed to be valid until it is found invalid, and because it is property in the highest sense. This is stated in a decision by the Supreme Court of the United States ex rel Wilbur v. Krushnic, 280 U.S. 304, 316, decided in 1960.

See also the quotation from Secretary Seaton in the case of U.S. v. O'Leary, above.

3. In further support of our position that the burden of proof should be on the government, we call attention to the rule that the mining laws are to be liberally construed in favor of the mining claim locator. See Lindley on Mines 3rd Ed., Vol. 2, Chapter 1; especially page 1203.

4. There is another rule which supports our position. It is that the law abhors forfeiture. Since Congress states what the citizen may do to locate a mining claim, and as so located the claim is valid until proved invalid. The action by the Department of the Interior in seeking to invalidate the claim is an attempted forfeiture. In support of this rule we cite 58 Corpus Juris Secundum, pp. 143 and 144.



The rule is also stated in MacDonald v. Midland Mining Co. (1956), 139 Cal. App. 2d, 304, at page 312 (6); 293 P. 2d, 911, where the court said:

"Every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture. "

## VII

### SUMMARY JUDGMENT

#### 1. Decisions Distinguished.

As our views on the impropriety of a summary judgment being used in our case is discussed in Section I of our Opening Brief at page 21, we would not discuss it again except to reply to some citations in the Appellee's Brief, particularly some decisions in other cases by this Court.

Our simple answer to these decisions is that while the summary judgment might be perfectly proper in those cases, the facts in our case are entirely different.

For one thing, in the cases involved in former decisions there was either no mineral or else the claims had not been worked for many years, the roads were washed out, or other difficulties were involved.

In the Coleman case we have practically a mountain of building stone on the 18 placer mining claims; the claims were located under a special Act of Congress authorizing such location, to-wit: Section 161 of 30 U.S.C.A. The claims are situated adjacent to a state highway and the stone has been used for building purposes.





Therefore, we had mineral on the claims; there was a sufficient amount to constitute discovery, and the amount of money spent was far in excess of the \$9,000.00 necessary for patenting the 18 claims.

2.        Secret Instructions.

At the first hearing of the Motion For Summary Judgment, the District Court denied it on our allegation that there were secret instructions. On resubmission, Department of the Interior regulations were attached to an affidavit by an Assistant Solicitor. The regulations, however, had to do with appeals within the Department. It had nothing to do with the instructions to a miner who wanted to locate claims. We, therefore, insist that there were secret instructions which the locator could not know about. This is supported by the speech made by Mr. Hochmuth, which is referred to in our Opening Brief in Section III, at pages 29 and 30. Mr. Hochmuth said:

"There can be no gainsaying that the mining law of 1872 is not administered as it was originally written and intended."

He further said:

"The result being that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making. . . ."

Since regulations must be published in the Federal Register before they can become operative, such decisions in private cases are not notice to the mining claim locator, and are secret as far as he is concerned.



### 3. Illegal Requirements.

The unauthorized additions by the Department of the Interior of requirement for present profit and market in order to prove discovery were never published in the Federal Register, if the Department had been given the right to make such additions.

We say the Department was never given such authority, as the mining laws were never amended in that regard. Therefore, such additions are secret and unauthorized rules which cannot be, and should not be, binding on a mining claimant.

### 4. Motion Nullified.

Even though the Motion For Summary Judgment was properly considered by the District Court, the Motion should have been denied based on "Exhibit 2" attached thereto, being a memorandum from D. M. Tucker, an employee of the Forest Service, addressed to the Regional Forester. This is discussed on pages 21 and 22 of our Opening Brief, and a portion of Mr. Tucker's memorandum is quoted on page 22.

This statement concerning the land and its uses, and the fact that the land was suitable for "supplying building stone for local use", nullified the Motion For Summary Judgment; proved Mr. Coleman's counterclaim, and such Motion should have been denied.

### 5. Method of Review Provided by Congress.

To us it seems so clear that since Congress, in the Administrative Procedure Act, provided the method for judicial review and set out in Section 1009(e) a number of items to be considered, this is the method to be pursued in the United States District Court.



While it is true that the scope of review provided in the Administrative Procedure Act is largely limited to legal questions and, therefore, may be analogous to summary judgment, we cannot help but feel that the process is somewhat broader under the Administrative Procedure Act Judicial Review.

Undoubtedly the term "summary judgment" carries the implication to the trial court that it should take summary action, whereas if the motion were called "Motion For Review Under The Administrative Procedure Act" this would have an entirely different implication. Certainly if that had been the motion in our case I doubt if the judge presiding in our case would have said that our case was not one for judicial review under the Administrative Procedure Act.

Again we refer to the fact stated both in the Appellee's Brief and discussed by us, that Congress is the only body authorized to legislate. When there is legislation it is the duty of the administrative tribunals and the courts to carry out such legislation.

In this connection, as it affects the Administrative Procedure Act, we refer the Court to our quotation from Wong Yang Sun v. McGrath (1950), 339 U. S. 33, on page 26 of our Opening Brief.

### CONCLUSION

The Department of the Interior made much of the fact that Mr. Coleman had not made a profit. Would any new enterprise ever grow if a profit was expected immediately? Of course, this Court in U. S. v. Adams, denies that present profit must be proved.

The testimony of Mr. Coleman was that he was getting the





land in shape and filing an application for patent so that he would be in a position to secure financial assistance to make this into a large operation. This, of course, is "good common sense", and is the method pursued by innumerable individuals and organizations in starting a small project and growing into a larger one.

This is the American system of individual initiative and free enterprise, and should not be stifled by illegal requirements as to proof of discovery and illiberal construction of the facts and the law.

Again we call attention to the rule that the law as it affects mining claims should be liberally construed.

We, therefore, renew our prayer as stated in our Opening Brief.

1. That the judgment of the District Court be reversed.
2. That the District Court be directed to find that the decision of the Department of the Interior is void, and ordering said Department to issue a mineral patent to Alfred Coleman covering the 18 Baldwin Lake Quarry Placer Mining Claims involved herein.

Respectfully submitted,

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Of Counsel



## CERTIFICATE

I certify in connection with the preparation of this brief that I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George W. Nilsson

GEORGE W. NILSSON





January 2, 1957

Honorable Fred A. Seaton  
Secretary of the Interior  
Washington 25, D. C.

My dear Mr. Secretary:

Reference is made to Section 5 of the new Multiple-Use Mining Law (Public Law 167, 84th Congress, 1st Sess.), which provides a procedure for determining expeditiously title uncertainties resulting from the existence of abandoned, invalid, dormant, or unidentifiable mining claims located prior to the passage (July 23, 1955) of Public Law 167.

When the House Committee on Interior and Insular Affairs considered and recommended the passage of the legislation which became Public Law 167, it was the understanding of this committee that section 5 was intended to be used only as a means whereby fraudulently-located, abandoned, or invalid mining claims located prior to the passage of the law would be placed in the same status, with respect to surface rights, as claims located after July 23, 1955. It was never intended that the procedures set forth in section 5 would be used to bring the average mining claimant to task and to serve as a dragnet to recapture for the Federal Government certain surface rights to bona fide mining claims located prior to July 23, 1955.

I am disturbed by reports reaching me which indicate that section 5 of Public Law 167 is being administered in a manner contrary to that contemplated and intended by this committee. I hope these reports will prove to be unfounded.

In view of the concern and responsibilities of this committee, I would appreciate being informed of the following at the earliest possible date:

A. With respect to each request for publication of notice to mining claimants for determination of surface rights, received by the Department of the Interior as of January 1, 1957, please furnish in table form and with appropriate column totals -

1. The name of the requesting department or agency;
2. Date each request was filed or received;
3. Office where filed;
4. Name of county, state, National forest or other named area in which lands are situated;
5. Approximate acres of lands covered;
6. Approximate number of (a) mining claims and (b) mining claimants affected;
7. Date of first publication of notice to mining claimants - actual or anticipated (indicate which)
8. Number of claimants to whom notices (a) have been or (b) will be mailed; and
9. Final date for filing verified statements - actual or anticipated dates (indicate which).

B. In regard to the total number of published notices, where the time for filing verified statements expired on or before January 1, 1957, please indicate -

1. The number of verified statements received in response thereto;
2. Number of claimants who filed verified statements;
3. Approximate number of (a) claimants who failed to file verified statements, other than those who signed waivers pursuant to section 6 of P.L. 167, and (b) mining claims affected thereby;



4. Number of (a) claimants who waived and relinquished certain surface rights to their mining claims pursuant to section 6 of Public Law 167, and (b) mining claims affected thereby;

5. The fixed or anticipated (indicate which) time and place for each hearing to be held as a result of the filing of the verified statements;

6. Number of (a) mining claims and (b) claimants thereto exempted from the hearings as a result of stipulations granted by the agency requesting publication of notice, wherein said agency acknowledges the validity and effectiveness of asserted surface rights to the claims; and

7. Number of (a) mining claims and (b) claimants thereto that will be affected by the hearings.

I would like to be supplied with (1) an outline of the proceedings of a typical hearing and (2) a copy of the established general procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands of the United States, which will govern the procedures with respect to notice of hearings and the conduct thereof, and with respect to appeals.

C. Will the burden of proof be on the mining claimants who appear at hearings held to determine the validity and effectiveness of any right or title to, or interest in or under their mining claims? If so, what would a mining claimant be expected to present in evidence to refute successfully the adverse contentions, where based upon a mineral examination of a claim, of the department or agency appearing against the claimant?

D. Does the Bureau of Land Management make mineral examinations of mining claims to determine their validity (1) before requesting a publication of notice to mining claimants, (2) after requesting publication of notice and before the filing of verified statements, (3) after the filing of verified statements, or (4) during all three periods? In those instances where mining or mineral experts of the Bureau of Land Management have looked over mining claims prior to the filing of requests for a publication of notice and the claimants thereto subsequently file verified statements, do mining or mineral experts of the Bureau always return to such claims and make a thorough mineral examination of each one to determine the validity and effectiveness of asserted surface rights?

E. When the Bureau of Land Management finds that valuable minerals do occur in a mining claim, does it ever look for or use other technicalities or defects to question or challenge the validity and effectiveness of asserted surface rights? If so, please explain and itemize each technicality or defect it may seek or use for the purpose.

F. Morrison's "Mining Rights", a publication which has served as a guide to prospectors, mining claimants, and attorneys for many decades, contains brief summaries of hundreds of court decisions defining the rights of mining claimants. Several summaries of court decisions which relate to that which constitutes a "discovery" and entitles a miner to make a valid location, taken from said publication, are presented in an attachment to this letter. Please inform me whether or not the Bureau of Land Management and the Department of the Interior recognize the rights set forth in the summaries attached hereto as being in full force and effect at this time. If not, please explain in full, cite court decisions, and present in full the criteria being used in the field and which will be used in hearings to determine the validity and effectiveness of asserted surface rights in mining claims.

G. If the value of the minerals found in the discovery shaft or other workings of an unpatented mining claim is used by the mineral experts of the Government to measure and determine the validity of a mining claim, and I am informed that such is the case, what is the cut-off point, in dollars or cents and in mineral content, below which lode



mining claims are considered to be invalid where the mineralization found contains: 1. Gold, 2. Silver, 3. Lead, 4. Zinc, 5. Copper, 6. Manganese, 7. Tungsten, 8. Chromite, 9. Iron, 10. Mica, 11. Fluorspar, 12. Uranium? If the size of a vein, lode, or deposit has any bearing on the determination of the validity of a mining claim, please explain and give controlling measurements.

X  
H. Regarding mining claims which were located in accordance with the Mining Laws of the United States prior to July 23, 1955, and on which the annual assessment work has been performed each year, does the Bureau of Land Management assert that such claims are subject to invalidation procedures under the provisions of Public Law 167 and, if so, on what basis?

I would also appreciate receiving copies of all outstanding instructions, orders, or rules issued by the Bureau of Land Management or the Department of the Interior which serve as a guide in conducting mineral examinations and in making determinations as to the validity of mining claims.

I anticipate that this committee will commence a series of hearings on the operation of Public Law 167 later this month. Therefore, I would appreciate being notified as to when the information requested herein may be received by the committee. Please forward such information as will be prepared locally as soon as it is ready, without waiting for the data that may be compiled in the field.

Sincerely yours,

/sgd/ Clair Engle

CLAIR ENGLE  
Chairman

Attachment

*Hearings held January 31 and  
February 1, 1957  
Report of hearings printed. It  
contains above letter - as well  
as testimony!*

(Emphasis added)





### Discovery the Inception of Title.

(Page 29)

The discovery of a lode of itself gives title to the vein for such length of time as is allowed by law for the completion of the location and record (Wurley v. Ennis, 12 M.R. 360; Ehardt v. Boaro, 4 M.R. 432; 113 U.S. 527); and when the location and record are made, if made in due time, the inception of title relates back to the date of discovery. (Burke v. McDonald, 29 Pac. 98.)

### The Discovery Need Not Show Pay Ore.

(Page 33)

It is sufficient that it disclose such a crevice as a miner would be willing to further open and follow.--McShane v. Kenkle, 44 Pac. 979; Shreve v. Copper Bell Co. 28 Pac. 315; Muldrick v. Brown, 61 Pac. 428.

### Proof of Mineral Contents.

(Page 33)

The discovery must be of a mineral bearing vein or deposit. The proof of mineral value does not require an assay, although an assay if taken is of material value as evidence.--Healey v. Rupp, 63 Pac. 319.

What is quartz or mineral bearing rock is determinable by the eye in most cases and such ores as galena, zink-blende, copper pyrites and many others necessarily indicate mineral contents. There are, however, varieties of ochre and other discolored earth and rock which may or may not carry any kind of valuable mineral, in which instances an assay or other test in common reason should be required.

### Discovery Must Show Well Defined Crevice.

(Page 42)

Besides reaching a certain depth, a well defined crevice must be found in the shaft.--Cheesman v. Shreve, 40 Fed. 787; 17 M.R. \_\_. "Crevice" means a "mineral bearing vein."--Beals v. Cone, 62 Pac. 958.

If a crevice does not show in ten feet, the shaft must go deeper; if it appears sooner, the ten feet must still be completed. The crevice shows the lode discovered, the depth shows the lode appropriated; even before the passage of any ten-foot shaft law, such a crevice was required to be shown; as decided by Hon. Judge Belford upon the location of the Bowman lode; but in the Eagle-Badger injunction case, decided at Denver, Hon. Judge Wells, while holding the necessity of a discovery shaft of the depth fixed by statute, also ruled that the term "crevice" must be taken in connection with the nature of the deposit, and that if, as was suggested, the Mt. Lincoln discoveries were not true veins or fissures, the shaft might pass entirely through the deposit and still remain a valid monument of occupation.

(Pages 42 and 43)

It Need Not Contain Ore or Mineral, but it must show mineral bearing rock--that is the gangue or crevice material of the vein--Copper Globe Co. v. Allman, 64 Pac. 1020--and it is error to omit this, as one of the essential elements of a discovery shaft in an instruction purporting to define such elements.--Bryan v. McCaig, 10 Colo. 309. It need not show pay ore.--Muldrick v. Brown, 61 Pac. 428.

### Size and Richness of Deposit Not Material.

(Page 152)

In North Noonday Co. v. Orient Co. 9 M.R. 537, Sawyer, J., says: "A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. It may be very thin and it may be many feet thick, or thin in places--almost, or quite pinched out, in miners' phrase--and in other places widening cut into extensive bodies of ore. So, also, in places, it may be quite, or nearly, barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode." Its validity as a thing that may be located does not depend on what it runs.--Shreve v. Copper Bell Co. 28 Pac. 315; Stinchfield v. Gills, 30 Pac. 839. Neither walls nor pay ore is essential, but it must show rock distinguishable from the country.--Burke v. McDonald, 33 Pac. 49. The fissure must be defined.--Cons. Wyoming Co. v. Champion Co. 63 Fed. 540.



On the facts in this case it is too late to call one vein a spur and the other a main vein.--Carson City Co. v. North Star Co. 73 Fed. 601.

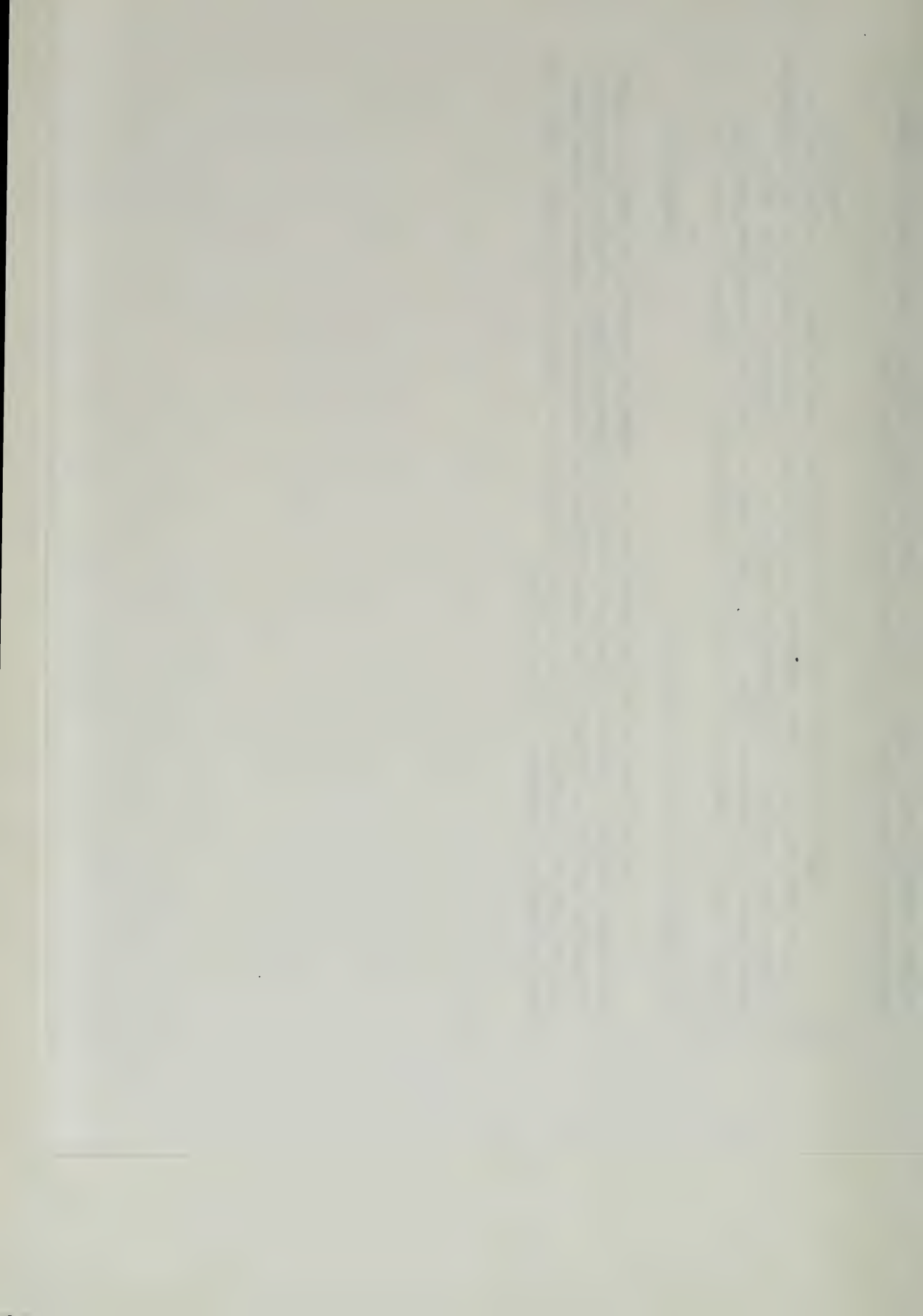
X Whatever a Miner Would Follow with the expectation of finding ore, or similar phrases, have been adopted as a practical test of what is to be considered a lode under the Act of Congress.--Eureka Co. v. Richmond Co. 9 M.R. 578; Harrington v. Chambers, 1 Pac. 362. Any body or belt of mineralized rock is a lode.--Book v. Justice Co. 58 Fed. 106; Shoshone Co. v. Rutter, 87 Fed. 801.

All Deposits "in Place" are Lodes.

(Page 155)

The uniform ruling has been that all forms of mineral or mineral gangue in place, whether fissure or contact veins, or impregnations, or other irregular deposits, should be construed to come within the expression "veins or lodes" used in the Act of Congress, and as such to be subject to location and patent under the Act.--Hayes v. Lavagnino, 53 Pac. 1029.

(Emphasis added)





Clair Engle

2D DISTRICT, CALIFORNIA

HOME ADDRESS:  
RED BLUFF, CALIFORNIA

OFFICE ADDRESS:  
323 HOUSE OFFICE BUILDING

Chairman

COMMITTEE:

Interior and Insular  
Affairs

**Congress of the United States**  
**House of Representatives**  
**Washington, D. C.**

January 8, 1957

Mr. George W. Nilsson, Secretary  
Mining Association of Southern California  
510 West Sixth Street  
Los Angeles, California

Dear Mr. Nilsson:

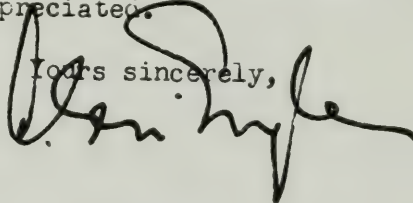
Attached please find a copy of a letter sent to Secretary Seaton on January 2, 1957, with regard to the procedures set up under Public Law 167, 84th Congress.

This is the law enacted under what was commonly known as the Multiple Use Bill. It set up certain procedures for getting rid of fraudulently located and abandoned mining claims; however, our information is that the Bureau of Land Management and the Forest Service are using this measure as a dragnet to challenge all mining claims of every kind and character.

The purpose of this letter is to find out exactly what is being done preliminary to hearings which will be held on the subject before our committee. A similar letter has gone to Secretary Benson of the Department of Agriculture.

Any information you can give the Committee on this subject will be very much appreciated.

Yours sincerely,



Clair Engle  
Chairman  
Committee on Interior and Insular Affairs

CE:1wl

Enclosure

Emphasis Added.





UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON 25, D. C.

5.04a

001 11 1957

Mr. George W. Nilsson  
510 West Sixth Street  
Los Angeles 14, California

Dear Mr. Nilsson:

We are enclosing two copies each of Circulars 1921 and 1961 containing regulations issued under the Multiple Use Act of July 23, 1955 (69 Stat. 367), and the Disposal of Materials Act of July 31, 1947 (61 Stat. 681).

Section 185.121 of Circular 1961 defines common varieties of minerals. As you know, it would be difficult to define a common variety of any material in such a way that it would not be subject to some misunderstanding. However, if the deposit of stone you are interested in developing has no special physical or chemical properties which differentiate it from other deposits of such material so as to give it a special and distinct value, it would be a common variety. For example, stone used for road surfacing, fill or ballast would be considered a common variety.

Stone, commercially valuable because of distinct and special properties, such as limestone suitable for cement making or of metallurgical or chemical grade, or stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, or stone suitable for monumental work would not be considered common varieties.

Sincerely yours,

For the Director

Enclosures





UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON 25, D. C.

DEC 13 1957

Mr. George W. Nilsson  
Attorney at Law  
510 West Sixth Street  
Los Angeles 14, California

Dear Mr. Nilsson:

In accordance with the request contained in your letter of December 10, 1957, to Solicitor Bennett, there are enclosed two copies of a press release issued on October 12, 1956, announcing that in the future all contest hearings conducted by the Bureau of Land Management would be governed by the provisions of the Administrative Procedure Act.

Sincerely yours,

*Ernest F. Horn*  
Ernest F. Horn  
Assistant Solicitor  
Land Appeals

Enclosures







UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON 25, D. C.

5.04a

FEB 9 - 1955

Mr. Lionel Richman  
Garrett, Richman & Nicoson  
1250 Wilshire Blvd., Suite 206  
Los Angeles 17, California

FEB 13 1955

Dear Mr. Richman:

Your letter of January 28 concerns the location of mining claims for dolomite and/or limestone. There are enclosed three papers which in part pertain to this subject:

Lode and Placer Mining Regulations - November 1, 1955;  
Circular 1941

Public Law 167 - 84th Congress - Act of July 23, 1955

43 CFR Part 185 - General Mining Regulations  
Sec. 185.120 through 185.137

The first pamphlet relates to the location of mining claims in general. The second paper is a copy of the Act of July 23, 1955. The third paper is a copy of the mining regulations concerned with the Act.

Under section 3 of this Act it states: "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more."



In Part 185.121 (b) and in footnote 2 of the regulations the term "common varieties" is defined. In the interpretation of this definition, it is not our intention to imply that limestone, gypsum or other like material possessing "distinct and special" properties would be excluded from the operation of the mining laws and placed under the Materials Act of 1947 (61 Stat. 681). We feel that these materials when they possess special properties that make them useful in the production of cement, metallurgical or chemical grade limestone, etc., should remain under the Mining Laws of 1872.

To further amplify on the stated definition in the regulations, a "common variety" of material is one that has no special physical or chemical properties which differentiate it from other deposits of such material so as to give it a special and distinct value. Certainly, under our definition of the term, limestone, quartzite or other material valuable for metallurgy, limestone suitable for cement making, stone suitable for cutting into blocks or naturally cleavable into slab suitable for building, or silica sand suitable for glass manufacture, foundry use, for example, would not be a "common variety". Such materials would remain subject to location under the mining laws upon a valid discovery and would, as in the past, be subject to patent upon proper application.

Therefore if the material is not a "common variety" of limestone it is locatable under the mining laws. If it is a "common variety" it must be purchased under the Materials Act of 1947 (61 Stat. 681), (see 43 CFR Part 259). Dolomite and/or limestone are not covered by the mineral leasing laws except in certain special areas.

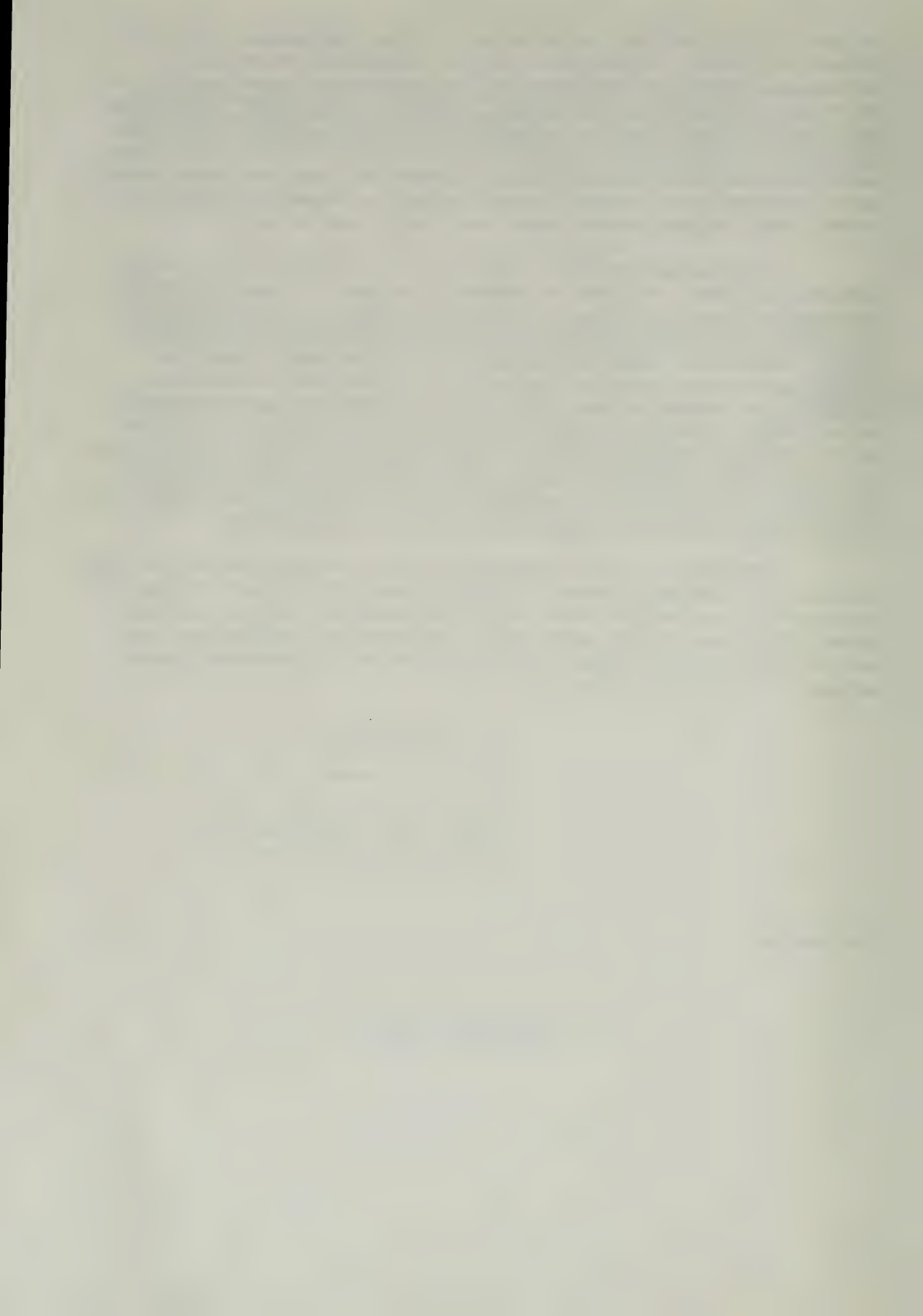
Sincerely yours,

For the Director



Enclosures

(Emphasis added)





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U N I T E D   S T A T E S   C O U R T   O F   A P P E A L S

For the Ninth Circuit.

---

THE MUTUAL LIFE INSURANCE COMPANY,  
OF NEW YORK, a corporation,

Defendant-Appellant,

vs.

ROBERT G. MOOREMAN, Trustee of the Estate of  
LAING-GARRETT CONSTRUCTION  
SPECIALTIES, INC.,

Plaintiff-Appellee.

---

On Appeal From The Judgment Of The United States  
District Court For The District Of Arizona.

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BRIEF FOR APPELLEE, ROBERT G. MOOREMAN, Trustee of the  
Estate of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.

---

---

WILSON & McCONNELL  
707 Security Building  
Phoenix, Arizona 85004

Attorneys for Plaintiff-Appellee.

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FILED

FEB 28 1966

WM. B. LUCK, CLERK



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## UNITED STATES COURT OF APPEALS

For the Ninth Circuit

---

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK, a corporation,

Defendant-Appellant,

vs.

ROBERT G. MOOREMAN, Trustee of the Estate of  
LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.,

Plaintiff-Appellee.

---

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

---

BRIEF OF APPELLEE-CROSS APPELLANT, ROBERT G. MOOREMAN,  
Trustee of the ESTATE OF LAING-GARRETT CONSTRUCTION  
SPECIALTIES, INC.

---

JURISDICTIONAL STATEMENT.

Plaintiff as Trustee in Bankruptcy of the Estate of Laing-Garrett Construction Specialties, Inc., an Arizona Corporation, brought action in the District Court of the District of Arizona, seeking judgment against Mutual Life Insurance Company of New York in the sum of \$80,000.00. Defendant was not an Arizona corporation, although licensed and qualified to do business in that State. Jurisdiction of the District Court is founded upon Sections 1332 and 1391, Judicial Code, Title 28, U.S.C. and by virtue of Section 46 of the Bankruptcy Act, Title 11, U.S.C. Jurisdiction of the United States Court of Appeals for the



2

Ninth Circuit is founded upon Sections 1291 and 2107, Judicial Code. Title 28, U.S.C., Notice of Appeal from judgment entered April 29, 1965, having been filed and docketed within the time prescribed by law.

STATEMENT OF CASE.

Plaintiff as successor in interest to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., (hereinafter called "corporation"), by his complaint sought judgment against MUTUAL LIFE INSURANCE COMPANY OF NEW YORK to recover death benefits payable pursuant to a policy issued by defendant upon the life of C. W. Laing, and on which policy LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was named beneficiary. The defense alleged was that the policy had lapsed on January 27, 1961, for non-payment of a premium due that date. It is plaintiff's position that defendant was indebted to the policy owner on January 27, 1961, in a sum more than sufficient to pay the premium then due, and is conclusively presumed to have applied such sum to the payment of the premium to prevent lapse.

FACTS.\*

In August of 1957 defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK issued its policy No. 823-53-41S insuring

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\*All references in parenthesis refer to stenographic trial transcript or an exhibit unless otherwise noted.



the life of Charles W. Laing. The policy was in the face amount of \$40,000., but provided that should the insured die as a result of riding as a passenger in an aircraft that the sum of \$80,000. would be payable. It also named LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. as the beneficiary, and also expressly provided "during the insured's lifetime all rights belong exclusively to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., or its successors", and "during the insured's lifetime the rights under this policy include the rights to change the beneficiary, to assign and all other rights, benefits, options, and privileges conferred by this policy or allowed by the company." (Exhibit A; Page 43).

The insured died on April 22, 1961, as the result of riding as a passenger in an aircraft (Trial Court's Findings of Fact No. 5, Exhibit 7), and plaintiff, as Trustee of the then bankrupt estate of the corporation, presented a claim to defendant for payment of the death benefits, which claim was rejected for the stated reason that the policy had lapsed for non-payment of the premium due January 27, 1961. (Exhibit 6; Trial Court's Finding of Fact No. 7). It is not disputed that all premiums on the policy had been paid up until that time (Exhibit 10) and that if the premium due January 27, 1961, was paid, the policy was in full force and effect at the date of the insured's death, and that death benefits were due to the beneficiary.

Plaintiff's claim that the defendant was indebted to the policy owner on January 27, 1961, in a sum sufficient to

pay the premium arises out of a loan transaction in August of 1960. At that time the corporation requested a loan against the policy. Pursuant to defendant's normal procedure and requirements, defendant's agent, Mr. Lillico, took the loan application to Mr. E. J. Hilkert, secretary of the corporation, and obtained his signature thereon (Exhibit H; Page 166 and 199). The application was sent to the defendant who approved the loan "subject to Resol. of the B. of D. authorizing the secretary to request loan" (Page 168, and Page 5 of Court's Findings of Fact). Mr. Laing, the other officer of the corporation did then send to the defendant, on a corporate letterhead, a copy of the resolution confirming Mr. Hilkert's authority to request the loan. (Exhibit I; Page 145-146, Page of Court's Findings of Fact). Ultimately the loan for \$2,491.46 was approved. Two days later, when it came time to disburse the proceeds of the loan, \$364.80 thereof was used to pay the current premium on the policy, and defendant delivered to Mr. Laing a check payable to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., in the sum of \$1,668.11 (page 90, and Page 5 of the Court's Findings of Fact). The remaining \$458.55 of the loan was not paid to the corporation, although defendant has continually claimed that the total loan was \$2,491.46, and has charged the corporate owner of the policy interest on that sum and extracted payment of that amount. Further, the balance of these loan proceeds has never been paid to the corporation, or plaintiff as its successor. Such sum, of course, was more than sufficient to

pay the quarterly premium of \$364.80 due on January 27, 1961, the alleged date of lapse.

Defendant states that the \$458.55 was not paid to the corporation because Mr. Laing orally instructed them to use this sum to pay a premium then due on another policy issued by the defendant and owned by Mr. Laing personally (P. 131). They acknowledge, however, that the corporation played no part in this request, that they relied solely upon Mr. Laing and made no effort to confirm his authority with anyone else in the corporation.

Books and records of the corporation did not reflect the loan from the defendant to the corporation, or what disbursement was made of the loan proceeds. (Page 324).

Appellee cannot acquiesce in the statement of facts submitted by appellant herein and submits that same is incomplete, substantially incorrect, and certainly misleading. Particularly, we call the Court's attention to the following:

a. There is no evidence before the Court to show that LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was anything other than a legitimate corporation, and the fact that they had only two stockholders, directors and officers does not alter the situation. The company was engaged in the construction specialties business, primarily in the field of acoustical ceiling and flooring. Mr. Laing was the person experienced in the industry, and Mr. Hilkert, with his accounting and legal background, served as financial backer and in an advisory capacity when special problems arose.



(Page 236-237); 261; 269-270). Whether or not Mr. Laing may have breached a fiduciary duty to the corporation does not in any way effect legitimacy of the corporation itself, nor make it his alter ego.

b. The issuance by defendant of two additional policies to Mr. Laing personally, is immaterial to the controversy before this Court. LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., the corporation, and plaintiff as its successor, have never, and do not now, claim any interest in Mr. Laing's personal policy. The record is devoid of any showing that they at any time participated therein, or in any agreements affecting same.

c. Automatic premium loan provisions of the corporate policy are not material to any controversy herein, for the reason that plaintiff has never contended, and does not contend, that the defendant should have granted another automatic premium loan to pay the premium due January of 1961, nor has plaintiff at any time contended that defendant should invade the "loan value" of the policy to pay the crucial premium.

d. Mr. Laing did not pay \$469.00 of his own money (loan proceeds from his personal policy) to the corporation. It is true that defendant approved loans on two additional policies owned by Mr. Laing personally, and that the proceeds of one of these loans, to-wit, \$469.00 was deposited in the corporate bank account. This deposit, however, is reflected in the books and records of the company as a credit against

Mr. Laing's personal account. There is absolutely no entry in the account showing Mr. Laing's use of the corporation's \$458.55 loan proceeds used to pay his personal premium (Page 322). Peculiarly, the check in the sum of \$1,668.11 which was made payable to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. and which represented corporate loan proceeds, (Exhibit E) is also credited to Mr. Laing's account with the corporation (Page 325).

e. While there is no doubt that Mr. Laing was indebted to the corporation, it is impossible to determine from the record before the Court and the books of the corporation, the extent of any such debt. Contrary to appellant's statement of facts, Exhibit Z, the ledger sheet entitled "Due Officers-C.W. Laing," does not reflect Mr. Laing's indebtedness, as it must be read together with Exhibit 11 entitled "Loans Payable-C.W. Laing" (Page 320). Further, these two exhibits together reflect merely debits and credits to Mr. Laing's account and the significance of the various entries cannot be pinpointed nor interpreted for the reason that the corporation did not follow normal accounting procedures, and Mr. Laing had used a personal bank account as a clearing house for corporate funds, all of which would be reflected by adjusting entries in his personal account (Page 316, Page 254).

f. Books and records of the corporation did not reflect whether or not Mr. Laing had paid previous premiums with corporate funds (Page 323-324), and if any funds of



the corporation were ever used to pay such premiums, the corporation did not have any notice thereof (Trial Court's Finding of Fact No. 12).

g. The record before the Court does not support a conclusion that the corporation at any time had authorized the use of its bank account for payment of premiums on Mr. Laing's personal policy. Defendant tried to establish such point, however, by offering Exhibits O and N which were two money-matic requests, by which they state Mr. Laing allowed them to draw checks on the corporate bank account to pay his personal premiums (Exhibits O and N). Objection was made by plaintiff to the admission of these documents, and ruling by the Trial Court was reserved pending argument in the briefs. No express finding has been made by the Trial Court as to whether or not the Exhibits were admitted, but pursuant to judgment in favor of plaintiff, we assume that they were not. Further, Exhibit O does not even purport to be signed by Mr. Laing as an officer of the corporation, but bears his personal signature without designation of the capacity in which he signed it. More important, the corporation did not even know that Mr. Laing had at any time used corporate funds to pay personal premiums (Trial Court's Finding of Fact No. 12, Page 323-324).

h. Defendant is not an innocent bystander to this transaction, but, in fact, not only allowed the diversion to occur, but compounded the confusion caused thereby by quoting erroneous lapse dates, not forwarding lapse notice

within the normal time, quoting excessive figures necessary to reinstate the policy, and erroneous premium dates (Pages 186-187; Page 213). In addition, the letter of April 11th directed to Mr. Hilkert by which they allege he was put on notice as to the transaction, and which letter, by the way, was received only nine days prior to the insured's death, and hardly in time to allow any action to be taken, and was wholly erroneous and misleading (Pages 132-133; 216).

#### QUESTIONS PRESENTED.

Whether or not death benefits were payable to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. and plaintiff as its successor on policy No. 823-53-41S is dependent upon a finding of whether or not the defendant had on hand, or was indebted to the policy owner on January 27, 1961, in a sum in excess of \$364.80, the amount necessary to pay the premium which then fell due. More specifically then we are concerned with determining whether or not the record before this Court supports a finding that plaintiff is not bound by defendant's attempted use of \$458.55 of company loan proceeds to pay a premium on a policy owned by anyone other than LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.

In addition, and pursuant to cross-appeal filed by plaintiff, was plaintiff entitled to interest on the amount of his claim from the date of proof of the insured's death?

Contrary to the implications made by defendant on Page 9 of its brief, there has never been an issue in this lawsuit

as to whether or not Mr. Laing was the alter ego of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. In fact, any such contention now is wholly inconsistent with the position taken by defendant at trial. (See defendant's opening statement Page 33-34 of the Transcript). Of course, this issue cannot properly be raised for the first time on appeal.

#### SPECIFICATION OF ERROR.

In support of cross-appeal herein, appellee-cross-appellant, Robert G. Mooreman as Trustee of the Estate of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., submits that the lower Court erred in finding and ruling that plaintiff was not entitled to interest on the amount of the judgment herein from and after the date of proof of the insured's death, plaintiff's complaint, trial memorandums, and proposed findings of fact and conclusions of law, having at all times requested same.

#### ARGUMENT.

While in adversary proceedings of this kind, one would expect variance in the interpretation that each party may place upon the evidence presented, the conclusions which defendant attempts to make herein go far beyond the scope of reasonableness. Appellant's argument in its brief is replete with gross exaggeration, and even factual misstatement. We request the Court exercise caution in accepting any of the factual statements unless there is also a record reference



to verify them.

In sum and substance, the decision of the Trial Court reflects that the defendant has not sustained its burden of proving that the policy (Exhibit A) was not in full force and effect on the date of Mr. Laing's death. Presumptively, it was in full force and effect, and it was the defendant's burden to establish to the contrary.

"An insurer admitting the issuance of a policy sued upon has the burden of showing its invalidity. The contract is presumed valid and subsisting and it is for the insurer to show facts as to its invalidity; it has, therefore, the burden of proving a forfeiture, particularly when the beneficiary has established a prima facie case."

(Volume 21, Appleman on Insurance,  
Page 18, No. 12095)

The Supreme Court of the State of Arizona has also approved this principle. In Sovereign Camp W.O.W. v. Madrigal, 12, P. 2d. 615, 40 Ariz. 396, (1932) our Supreme Court said:

"It is a general rule of law that, when an insurer pleads and relies upon the non-payment of a premium or assessment as grounds for forfeiting the policy, after it has once been placed in force, the burden of proving such non-payment is upon it."

The above principle is only a reiteration of the general attitude of the law, which abhors forfeitures. Liberal rules of construction to avoid forfeitures are approved, and it is well established that Courts will always deal generously with the rights of an insured. (16 Appleman on Insurance, Page 599, No. 9082; Watson v. Ocean Accident and Guarantee Corp., 238 P. 338, 28 Ariz. 573 (1925); No. British and Mercantile

Ins. Co. v. San Francisco Securities Corp., 249, P. 761,  
30 Ariz. 599).

Obviously the Trial Court was not satisfied, and did not believe that the premium of January 27, 1961, was not paid. In fact, it has expressly found to the contrary:

"That the premium which became due January 27, 1961, on said corporate policy was paid within the time required by said policy, and that therefore, the said policy was on and before January 27, 1961, and after the death of the said Charles W. Laing in full force and effect."  
(Finding of Fact No. 14)

The Trial Court's Finding of Fact "shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses" (Fed. Rules of Procedure Rule No. 52, 28 U.S.C.A.). The Court of Appeals does not retry the issues and substitute its judgment for that of the trial court (Weiby v. Farmers Mutual Auto Insurance Company, 273, F. 2d 327, C.C.A. Min. (1960). A trial court's finding will not be disturbed unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law (C.S. Foreman Co. v. Great Lakes Pipe Line Co., 274 F. 2d 61, C.C.A. Mo. (1960). The findings made by the trial Judge here are sustained by the evidence, and are not induced by any erroneous view of the law.



PLAINTIFF IS NOT BOUND BY DEFENDANT'S ATTEMPTED USE  
OF \$458.55 OF COMPANY LOAN PROCEEDS TO PAY A PREMIUM ON A  
POLICY OWNED BY ANYONE OTHER THAN LAING-GARRETT CONSTRUCTION  
SPECIALTIES, INC.

Upon approval of the loan application, defendant held \$2,491.46 for its policy owner. Of this they used \$364.80 to pay a premium then due on the policy, and they executed and delivered to president Laing a check payable to the corporation for \$1,668.11. The remaining \$458.55 has never been paid to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. or its assigns or to its benefit. The only reasonable conclusion, therefore, is that defendant continued to hold this sum for its policy owner and therefore, had it on hand on January 27, 1961. If they did not have said sum on hand, then they have wrongfully and fraudulently misappropriated it to its own use or to some other use, and are liable to plaintiff therefor. They claim they used this sum to pay a premium of Mr. Laing's personal policy and that this was done at his request. (Page 131). Any such request made by Mr. Laing was on its face ultra vires the powers of the corporation, a breach of his fiduciary relationship, and in fraud of his principal's interest. Further, and more important, this was obvious to the defendant, or certainly should have been obvious to them.

If it is defendant's position that Mr. Laing was authorized to make this diversion and to bind the corporation

thereby, it was their burden to establish this. The burden of establishing authority of an agent rests upon the one who alleges he was authorized. (Bank of America National Trust and Savings Association v. Barnett, et al, 87 Ariz. 96, 348 P. 2d. 396, (1960)). The Supreme Court of Arizona in the last cited case states:

"The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the ability to 'stop, look and listen,' and if he would bind the principal is bound to ascertain not only the fact of agency, but the nature and extent of authority, and in case either is controverted the burden of proof is upon him to establish it."

The Trial Court has found:

"That Laing did not at any time have apparent nor implied authority to use corporate funds to pay any premium on policy No. 83-96-309 owned by Charles W. Laing personally, and that said Laing had no authority to use said sum of \$458.55 to pay a premium on his said policy, and had no authority to instruct the insurance company to apply said sum of \$458.55 in payment upon his personal policy." (Finding of Fact No. 10)

and

"That defendant insurance company had no right nor authority to use said indebtedness of \$458.55 of corporate loan proceed to pay a premium on policy No. 83-96-309 owned by Charles W. Laing personally or upon a payment of any other policy other than the 'corporate policy'." (Finding of Fact No. 11)

A. Mr. Laing did not have actual authority to request the diversion.

Powers of a corporation are, of course, derived from its Articles of Incorporation (Exhibit I) which here do not authorize use of company assets for payment of personal insurance premiums, or in fact for any personal purposes of the officers. (Page 262). A corporation cannot empower an officer to do any act which may not lawfully be done under its charter (13 Am. Jur. 869, Corporations 889). Hence, LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was without the capacity to authorize Mr. Laing to use their company money for his personal premiums. The corporation, in fact, through its Board of Directors and other officer, Mr. Hilkert, did not ever grant actual authority to Mr. Laing to do so (Page 264, and Page 267), except for minor accommodation purposes. And even with the most severe cross-examination, defendant was unable to extract any evidence to the contrary. Any attempt by Mr. Laing to use company money for his personal premium was absolutely beyond the scope of his actual authority, and the record is devoid of any evidence to the contrary.

Defendant would have us believe that because Mr. Laing had used corporate credit for "accommodation purchases" that this is evidence that he had authority to use corporate funds for personal reasons other than accommodation purchases. (Page 242-243). The corporation did qualify for discounts in their industry, and when any officer of the corporation, or employee, wanted to make a purchase on which the company would be entitled to a discount, they were granted the privilege of making the purchase in the corporation name and



having the billing go to the corporation. This was strictly conditioned upon their payment or repayment of the amount of the purchase (243-244). Mr. Laing did use the privilege of using company credit for these purposes, and the amount of the accommodation purchases made by him is unknown. It cannot be argued, however, that payment of a personal premium falls within the definition of the "accommodation purchases." The latter are not the slightest evidence of actual authority in Mr. Laing to use corporate loan proceeds, or any company funds, to pay personal premiums.

B. Mr. Laing did not have apparent authority to request diversion of the funds.

Defendant argues that apparent authority exists here for the reason that Laing was indebted to the company, and therefore, must have been using company credit in the past; and further, because the defendant did pay premiums on his personal policy. The record supports neither of these contentions, but even if true this would not support a finding that Mr. Laing was apparently authorized to use company loan proceeds to pay his personal premium.

As defined by the restatement of agency, Section 27, apparent authority requires: 1) Conduct by a principal; 2) Which when reasonably interpreted; (3) Causes another to believe the principal party consents to the agent's act. What conduct has there been by the corporation, not that the doing of Laing alone, which when reasonably interpreted by defendant would have lead them to believe that Mr. Laing

could use corporate loan proceeds to pay his personal premium? ---Whether or not Mr. Laing may have been indebted to the company, such fact would be no evidence of apparent authority. First, the evidence presented at trial does not allow us to determine the extent of any such indebtedness. The company's books were not in the best order, and Exhibits Z and 11 (Page 32) are not sufficient to enable us to determine the extent of any indebtedness. They represent at most debits and credits to his account, the exact significance of which are unknown. (Page 316 and 254). Mr. Price, in addition to Mr. Hilkert, acknowledges that these entries cannot be interpreted. More important, however, the defendant did not have any knowledge of the entries on these ledger sheets, or the extent of Mr. Laing's indebtedness at the time they attempted to use the \$458.55 of corporate loan proceeds on his personal policy.---Whether or not the company ever paid premiums on Mr. Laing's personal policy in the past is no evidence of his apparent authority. While the Trial Court has made no finding of fact as to whether or not the corporation had paid premiums in the past, they did expressly find:

"That the Laing Corporation did not at any time have actual nor implied notice of use of corporate funds by Laing to pay any premium on his personal policy No. 839-63-09." (Finding of Fact No. 12)

Nor can the corporation itself or Mr. Hilkert, the other officer, be charged with any knowledge that the corporation had paid such premiums in the past. Although the books reflected disbursements of an amount similar to the amount of



Mr. Laing's personal premium, they do not identify the entries as being premium payments, and it was impossible from reviewing the books to determine whether or not they were in fact premium payments. (Page 323-324). Mr. Laing's execution of the two money-matic requests (Exhibits N and O) are at most unilateral acts by Mr. Laing, unknown to the corporation, and cannot serve as a basis of any apparent authority.

That Laing deposited the \$469.00 from his personal policy in the corporation bank account is not evidence of apparent authority. Most obviously, what he did with his personal loan proceeds was not known to the defendant, and could not be relied upon then in determining the validity of their using company money to pay his personal premium. Defendant has continually argued that this is not a diversion, but was merely an exchange of corporate funds for personal funds previously given to the corporation. This is wholly unsupported by the record and factually untrue. Mr. Laing did not give the \$469.00 personal loan proceeds to the company, but rather deposited them in the company account, and credited them to his own ledger account (Page 322).

Complete review of the record will reveal no conduct of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., not the conduct of Mr. Laing alone, upon which the defendant relied in determining whether or not he had the right to use the company money for his personal policy. Acts by Mr. Laing alone serve as neither the basis of apparent authority, or evidence of

his authority:

"In the early case of Brutinel v Nygren, 17 Ariz. 491, 154 P. 1042, LRA 1918F, 713, this Court recognized the rule applicable herein,

'...That an agent cannot create in himself an authority to do a particular act by its performance; and that the authority of an agent cannot be proved by his own statement he is such...'

"...The nature and extent of an agent's authority...ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent cannot confer authority upon himself, or make himself agent merely by acting as such or saying that he is one..."

"The agent's authority, moreover, may not be shown merely by proving that he acted as agent. A person can no more make himself agent by his own acts only than he can by his own declarations or statements... (Mechem on Agency, Sec. 289, (17 Ariz. at 497, 154 P. at P. #1044))."

"In United States Smelting, Refining & Mining Exploration Co. v. Wallapai Mining and Development Co., 27 Ariz. 126, 130, 230 P. 1109, 1110, this Court stated:

"...The rule is well established not only in this State but elsewhere that the declarations of an alleged agent are not evidence of the fact of agency nor the extent thereof. The agency must be proved by other evidence before his (the agent's) acts and statements can be shown against the principal. At best such declarations are mere heresay..."  
(Bank of America Nat'l Trust & Savings Asso. vs. Barnett, Supra.)

In determining the state of Mr. Laing's authority here, we are not discussing factual situations which existed in

the Glens Falls Indemnity and Reif cases argued at length in appellant's brief (Glens Falls Indemnity Co. v. Palmetto Bank, 23 F. Supp. 844 (D. C., W. D. S. C., 1938), affd. 104 F. 2d 671). The Court, in the last cited cases, made very clear that their rulings were based upon findings that the persons dealing with the agent were "dealing with him in good faith" (Page 24 of appellant's brief), that there was no evidence that the third party had "notice of any intended misappropriation" (Page 26 of appellant's brief), and that the corporation had notice, of the acts for the reason that the "indebtedness was invariably entered correctly in the corporate books." Defendant here, of course, has not dealt in good faith, was not innocent of the fact that Mr. Laing intended to misappropriate the funds of the corporation, and the corporation did not, in fact, know this nor have any way of knowing this.

Most important in establishment of apparent authority is good faith and reasonableness of the part of the party dealing with the agent. How could the defendant have reasonably believed that Mr. Laing had the right to use company money to pay his personal premium? Defendant's agent, Mr. Lillico, who handled the transaction has testified that he was well familiar with the nature of the business of the corporation, that he had known Mr. Laing for 29 years and Mr. Hilkert for 30 years; that he knew they were officers of the corporation; that he originally sold the policy in question to the corporation and also two additional policies



to Mr. Laing; that the corporate policy was issued after discussion and conference with both Mr. Hilkert and Mr. Laing; that he pursuant to normal company policy requiring verification of authority to apply for a loan, took the application to Mr. Hilkert for signature and then later confirmed Mr. Hilkert's authority in writing by obtaining a copy of the resolution from Mr. Laing and forwarded them to the company before the loan was actually approved (Page 159-166). He obviously was aware of the fact that any use of the company loan proceeds by Mr. Laing would be to the detriment of Mr. Hilkert, and to creditors of the corporation, and in fact was a fraud upon the corporation. If he followed Mr. Laing's instructions under these circumstances, he acted at his peril.

The record does not support a conclusion that LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was the alter ego of its president, Mr. Laing, that defendant ever believed this, or believed that it could disregard the corporation as a separate entity from that of its officers. That defendant required confirmation of an officer's authority prior to accepting a loan, leaves no question about this. We respectfully request the Court disregard the defendant's argument that an alter ego situation exists here, not only because the record does not support it, but for the further reason that this is the first time any such issue has been raised herein. (Fanchon & Marco, Inc. v. Paramount Pictures, 215 F. 2d 167, Cert. denied 75 S. Ct. 293, 348 U.S. 912, 99 L. Ed. 715 (C.C.A. Calif. - 1954); (Dougall v. Spokane P. & S.

Ry. Co., 207 F. 2d. 843, Cert. denied 74 S. Ct. 429, 347 U.S. 904, 98 L. Ed. 1063 (C.C.A. -Or. - 1954); (First Nat. Bank of Dodge City, Kan. v. Perschbacher, 335 F. 2d 442 (C.C.A. N. Mex.); (Hebets v. Scott, 152 F. 2d 739 (C.C.A. Ariz. - 1946)).

C. The corporation, and plaintiff as its successor, has not ratified the diversion of funds and is not estopped now to question same.

One cannot ratify an act which it could not authorize in the first instance. Specifically a corporation cannot ratify an ultra vires act (13 Am. Jur. 931-933, Corporations 979-980). Ratification can result only upon full knowledge of all material facts, and upon formal action by the corporation at a properly assembled meeting (13 Am. Jur. 930-934, Corps. 978, 982.)

Mr. Laing, by his conduct, of course, could not ratify his own act, and bestow authority upon himself.

"The president cannot be regarded as the agent of the corporation for the purpose of ratifying his own acts any more than for conferring authority upon himself in the first instance to make a contract." (13 Am. Jur. 932, Corporations, 979).

Books and records of the corporation did not reflect the loan nor the application of the loan proceeds, nor the fact that \$458.55 had not been received, nor that Mr. Laing may have used company money to pay premiums in the past. (Pages 325-326). Mr. Hilkert acted promptly upon discovery of the diversion, but unfortunately, the insured died approxi-



mately nine days afterwards and the affairs of the corporation were immediately tied up resulting eventually in the involuntary petition in bankruptcy. The corporation did no act upon which the defendant relied, or had a right to rely, and defendant did not change its position to its detriment in reliance on the conduct of the corporation. Thus, all necessary elements of estoppel are lacking (19 Am. Jur. 643, Estoppel No. 42). The last element of estoppel warrants further discussion. In this case, how did defendant change its position to its detriment? The only thing they did was to secure another premium payment on policy 839-63-09, which of course, operated only to its benefit. It only improved its position.

For the sake of argument, however, even were it true that the corporation would be estopped and denied authority to use its money for payment of Mr. Laing's premium, such estoppel would not be applicable to the plaintiff who represents creditors of the insolvent corporation. The corporation exists not only for its stockholders, but also its assets constitute a trust for the benefit of its creditors. A stockholder or officer even with the approval of the Board of Directors cannot divert corporate assets for personal purposes to the prejudice of its creditors. (Ward v. City Trust 84, NE. 585). Accordingly, plaintiff as Trustee in Bankruptcy of the estate of the insolvent corporation, is not bound by any such diversion, nor estopped to claim it was improper. The Court in Jennings v. Studebaker Sales

Corp., 170 A. 626-N.J. 1934) had before it a case strikingly similar to ours. A receiver of an insolvent corporation sought recovery of \$27,000 paid its president, Mr. Jones, by a series of corporation checks, on a personal debt; the Court found that the Jones Corporation never authorized the use of its funds to pay Mr. Jones' debt, nor authorized him to sign any agreement as president of the corporation binding the corporation to repay his personal loan. At Page 627, and the Court stated:

"The money owed by Mr. Jones to the defendant was of no concern whatever to the Jones Corporation, and outside the authority conferred by law or by the by-laws, upon Jones, as president, he had no power to bind the corporation any more than any other director."

"The relation a director bears to a corporation is essentially fiduciary, and it does not require a code of regulation to inform such fiduciary officer what he may or may not do. Common honesty is the unfailing index to what is permissible and what is forbidden."

And at Page 628:

"As a matter of law, the defendant in receiving from Mr. Jones, the president of the Jones Corporation, the funds of the company in payment of a personal debt of its president, receives it at its peril. Prima facie the act is unlawful unless authorized or ratified by the corporation. (Citations given)

"It is further urged that at the time these payments were made the corporation was solvent. Assuming that the corporation was solvent, no authority can be cited in support of the proposition that its president may misappropriate its funds, diverting them for the pay-

ment of personal obligations without authority, precedent or subsequent. Estoppel cannot be invoked against the receiver of a corporation presently insolvent who represents both creditors, stockholders and all parties in interest in a transaction unconscionable in essence and known to be such by the party sought to be charged even though the transaction had consummated while the corporation was solvent in the absence of the consent of all parties concerned. The appellant was not an innocent holder. On the stated days it received in payment of Jones personal obligation checks of the corporation. The receipt of these drafts on corporation funds was an eloquent warning that reasonable people could not misunderstand."

As found by the trial court, Mr. Laing did not have authority to request or instruct use of the corporate money to pay his personal premium, defendant did not have the right nor authority to use said corporate loan proceeds to pay a premium on a policy owned by Mr. Laing or anyone else, and these findings of fact being supported by the record are conclusive.



POINT TWO

DEFENDANT WAS INDEBTED TO THE POLICY OWNER, LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. ON JANUARY 27, 1961, IN THE SUM MORE THAN SUFFICIENT TO PAY THE PREMIUM THEN FALLING DUE, AND IS CONCLUSIVELY PRESUMED TO HAVE DONE SO TO AVOID A LAPSE.

The debt arose at the time of a distribution of the loan proceeds, by failure of defendant to pay to the policy owner \$458.55 of the loan proceeds. It is only a matter of semantics as to whether we say defendant did not pay over this sum of the corporation, or whether they have fraudulently and wrongfully misappropriated this money and thus are liable to the policy owner for the amount of damages sustained. In either event, defendant held \$458.55 for the use and benefit of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. at the time the premium fell due on January 27, 1961. (Finding No. 9). The parties, to-wit: the policy owner LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., and MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, had not contracted in regard to disposition and application of these funds. (The parties, of course, had contracted as to the use of the "loan value" of the policy. The \$458.55 then on hand no longer was "loan value" already having been removed therefrom by virtue of the loan transaction of August, 1960. This is further born out by the fact that defendant at all times herein has continued to claim interest due on the said sum by virtue of the loan and in calculating the "paid up value" of the policy claim a set off in that

amount. It is not now, nor never has been plaintiff's position that defendant was required to use any portion of the "loan value" of the policy to pay a premium. This the contract does prohibit under the circumstances here. Once having made a loan, however, setting it up on their books as the sum due from the policy owner, and in fact charging interest thereon, these are funds which absolutely belong to the policy owner upon approval of the loan.) Thus, being indebted to the corporation on January 27, 1961, in the sum of \$458.55, defendant is conclusively presumed to have used \$364.80 thereof to pay the premium which then fell due.

Equitable Life Assurance Society of U.S. v. Pettid  
11 P. 2d. 833 40 Ariz. 239 - 1932

U.S. v. Morell, 204 F. 2d. 490 (C.C.A. N.D. - 1953)

Union Central Life Insurance Company v. Caldwell,  
58, S.W. 355 (Ark. 1900)

Birlew v. Mutual Benefit H. and A. Association,  
24 P. 2d 677 (Idaho - 1933)

McNaughton v. DeMonies Life Insurance Company,  
122 NW. 764 (Wis. 1909)

Fogg v. Morris Plan Insurance Company, 188 New  
York Sup 867 (1921)

Reliance Life Insurance Company v. Hardy, 222  
SW 12 (Ark. 1920)

Ruderman v. Mass Accident Company, 180 A, 237  
N.J. (1935)

Leech v. Federal Life Insurance Company,  
15 NE 2d 1006 (C.C.A. Ill. - 1938)

Commonwealth Life Insurance Company v. Gault's  
Administrator, 76, SW 2d 618 (Ky. 1934)

Cheek v. Commonwealth, 126, SW 2d 1084  
(Ky. 1939)



This is not a limited principle, but one absolute in the law of insurance, once it has been found that there is money on hand, regardless of its source, and that the parties have not contracted to the contrary, both of which situations exists here.

POINT THREE

PLAINTIFF IS ENTITLED TO INTEREST ON THE AMOUNT DUE  
PURSUANT TO THE POLICY FROM AND AFTER THE DATE OF PROOF OF  
DEATH OF THE INSURED.

The policy (Exhibit A) provides:

"The Mutual Life Insurance Company of New York will pay the face amount to the beneficiary upon receipt of due proof of the insured's death whether death occurs before or after the paid up date subject to the provisions on this and the following pages of this policy..."

Defendant was satisfied as to the fact of death of the insured as of the 4th day of October, 1961, and waived formal proof of death by its letter of that date (Exhibit L). Accordingly, the proceeds of the policy were payable at the latest by October 4, 1961.

It is absolutely settled law in the State of Arizona that a creditor is entitled to interest on money withheld after due, as damages for the loss of its use (Southwest Mines and Development Company v. Martignene, 64 P. 2d. 1031, 49 Ariz. 88).

Interest is payable as a matter of law on sums due from and after the due date thereof or demand for payment, and the right to interest is not dependent upon contractual provisions of the parties. (Arizona Life Insurance Company v. Lindell, 140 P. 60, 15 Ariz. 471 - 1914; Cochise Hotels v. Douglas Hotel Operating Company, 316 P. 2d. 290, 83, Ariz. 40, (1957)). See also Palmercroft Development Company v.

City of Phoenix, 51 P. 2d. 921, 46 Ariz. 400 (1935); Atlantic Commission v. Noe, 53 P. 1088, 47 Ariz. 123 (1936).

A.R.S. 44-1201 provides for 6% interest upon any "legal indebtedness unless contracted to the contrary."

The general rule is also stated in 47 C.J.S. 55, Interest No. 45, even though the contract itself provides that the debt is not to bear interest. At Page 57, and Interest No. 46, it is stated that in the absence of a special contract as to interest, or the time a debt is due, the interest is allowable from the time of demand. (See also 46 C.J.S. 1080, Insurance No. 1690)

Having found that defendant is liable to plaintiff in the sum of \$76,832.05, that defendant was satisfied as to the proof of the insured's death as of October 4 1961, and has waived formal proof thereof, the Trial Court should have allowed interest on the sum due from October 4, 1961, at the rate of 6% per annum until paid. Plaintiff at all times since the inception of this suit has requested interest, as is reflected by plaintiff's complaint, trial memorandums and proposed findings of fact and conclusions of law.

#### CONCLUSION.

LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was a small closely held company; this does not mean, however that it was not a legitimate corporation. As is common in many such companies, one businessman was primarily the financial backer and the other handled the management. Mr. Hilkert not being

familiar with the construction or building industry, relied heavily upon Mr. Laing--and unfortunately his integrity--in the day to day operation of the business affairs. If any special problems arose which involved company policy, Mr. Hilkert would participate. He, at all times, proceeded in good faith and assumed that Mr. Laing was doing the same. Upon the latter's death, however, it became apparent that such was not the case, to the regret of the company creditors, including Mr. Hilkert. From the books and records of the company, it is impossible to determine what did happen. It is clear, however, that Mr. Hilkert, at no time prior to Mr. Laing's death, knew or could reasonably have been expected to know, whether or not Mr. Laing was using company money to pay personal premiums, or that he had been using company money for any other personal purposes other than nominal accommodation purchases.

It is not material here to evaluate Mr. Laing's conduct, but only to determine whether or not the defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK has properly refused to remit the \$458.55 balance of the company loan to the company, or whether the defendant, through its carelessness or actual fraud, has made itself a party to the wrong attempted to be perpetrated by Mr. Laing. By the policy-contract defendant has agreed that LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was the "right owner" in the policy and that it alone had the privilege of exercising the various options provided. We only ask that they be held to the



terms of this contract which they have made.

Defendant is in no position to plead innocence, nor that they have been prejudiced in any way. They relied upon Mr. Laing's representations at their peril, in a situation where anyone with any common sense would have backed off. By the manner in which they processed the loan application, requiring confirmation of authority by both officers of the corporation, they leave no doubt but that they were aware of problems that can arise in dealing with an agent of the corporation, including LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. Then when it came time to disburse the loan, they "threw caution to the wind" and try to tell us that they followed an oral instruction from Mr. Laing to use the money on his personal policy. This no reasonable person can be expected to believe. Mr. Lillico, in complying with his buddy Laing's request, not only allowed a fraud to be committed, but in effect made defendant a party to it.

The only fair conclusion is that defendant has very casually, carelessly, negligently, if not fraudulently handle this account. Their errors have only compounded themselves. Particularly, their letter of April 11th in response to an inquiry to Mr. Hilkert (Page 132-133 and 216) upon which they say Mr. Hilkert should have been alerted to the situation is wholly erroneous and misleading, and caused only further confusion instead of helping the situation.

If Mr. Laing had paid his personal premiums with company money in the past, the first time it happened it was wrong,



the second time it happened it was wrong, and every time thereafter, and defendant knew each and every time that it was wrong and repetition did not make it right.

We are not here to evaluate the conduct of either Mr. Laing or Mr. Hilkert; what they did or intended is immaterial; plaintiff's rights are not derivative from them. In fact, had they both concurred in a gift of company assets to the defendant or any other person, the act would have been in fraud of creditors and still invalid.

The ruling of the trial Court is supported by the evidence, and reflects that defendant has not overcome the presumption that the policy remains in full force and effect to the date of death of the insured, nor sustained its burden of proving a lapse. There is no reason to declare the policy forfeited; it was in full force and effect at the date of Mr. Laing's death. Judgment in favor of plaintiff and against defendant in the sum of \$76,832.05, plus interest at the rate of 6% per annum until paid, from October 4, 1961, is proper.

WILSON & McCONNELL

Attorneys for Plaintiff-Appellee-Cross-Appellant

---

CERTIFICATE OF ATTORNEY.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Beverly J. McConnell

Attorney for Plaintiff-Appellee.

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No. 20221

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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add. info.*

BRADY-HAMILTON STEVEDORE CO.,  
a corporation,

*Appellant,*

v.

WATERMAN STEAMSHIP CORP.,

*Appellee,*

WATERMAN STEAMSHIP CORP.,

*Appellant,*

v.

MATSON TERMINALS, INC.,  
a corporation,

*Appellee.*

**BRIEF OF APPELLEE MATSON TERMINALS, INC.**

*Appeal from the United States District Court  
for the District of Oregon*

HOLLISTER & THOMAS  
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9-65

**FILED**

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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BRADY-HAMILTON STEVEDORE CO.,  
a corporation,

*Appellant,*

v.

WATERMAN STEAMSHIP CORP.,

*Appellee,*

WATERMAN STEAMSHIP CORP.,

*Appellant,*

v.

MATSON TERMINALS, INC.,  
a corporation,

*Appellee.*

---

**BRIEF OF APPELLEE MATSON TERMINALS, INC.**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**JURISDICTION**

Cross-Appellee Matson Terminals, Inc. (Matson) adopts the statements of jurisdiction set forth at pages 1 and 2 of the Brief of Respondent-Appellant Brady-

Hamilton Stevedore Company (Brady) and at pages 1 and 2 of the Brief of Libellant-Appellee Waterman Steamship Corp. (Waterman).

### STATEMENT OF THE CASE

The statement of the case set forth at pages 2-4 of Brady's brief is correct, except that it was uncertain whether longshoreman Booker T. Campbell was using a tag line or his hands to guide the deep tank cover as it was being raised (R., Ex. 3, 46, 47, 48).

With respect to Brady's liability to Waterman, Matson also accepts and adopts the statement of facts set forth at pages 6-10 of Waterman's brief.

Since the existence or non-existence of Matson's liability to Waterman is solely a question of fact, additional facts which support Matson's position on this appeal are set out below in the section entitled "Argument".

### SUMMARY OF ARGUMENT

1. Waterman did not sustain its burden of proving that Matson inadequately lighted the lower 'tween deck space.

2. The trial judge made the following findings:

"[T]he lack of adequate lighting, if such was the fact, was not a causative factor in the workman's fall and resulting injuries. It is my finding that the sole and only cause of such injuries was the negligence of Brady in failing to properly replace the

hatch boards and the unseaworthy condition resulting therefrom." (R., Vol. 1, 22)

The Court's finding that inadequate lighting did not contribute to longshoreman Campbell's accident was not "clearly erroneous", and was in fact correct.

## ARGUMENT

### A. Preliminary Statement.

Waterman's cross appeal is limited to contentions (1) that Matson failed to light the lower 'tween deck adequately, and (2) that this failure was a contributing cause of Campbell's injuries. If the record requires that both of these contentions be deemed established, then Matson is liable to Waterman by reason of the indemnity clause in its stevedoring contract (R., Ex. 31, Paragraph 12(3)), and also by virtue of a breach of its implied warranty of workmanlike performance. If, however, there was no evidence of inadequate lighting, or if Judge Kilkenney's finding (R., Vol. 1, 22) that Brady's negligence alone caused the accident was not clearly erroneous, then Matson cannot be held answerable to Waterman and the judgment of the lower court should be affirmed. Authorities which define the scope of appellate review of disputed findings of fact in admiralty cases are discussed at length in pages 5 and 6 of Waterman's brief. See, e.g., *McAllister v. United States*, 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954); *Pacific Towboat Co. v. United States Corporation of Delaware*, 9th Cir., 276 F.2d 745, 752 (1960).

**B. The Record Does Not Require and Would Not Support a Finding That Lighting Was Inadequate at Place of Accident.**

Judge Kilkenney found that "lack of inadequate lighting, if such was the fact, was not a causative factor in the workman's fall and resulting injuries." (R., Vol. 1, 22). Accordingly, he was not required to make a finding on the issue of adequacy of lighting, although his opinion contains the following statement, which in context is no more than an "arguendo":

"The record, although sketchy and indefinite, probably supports a finding that Matson failed to properly light the area in which the longshoremen were working. The testimony and report of its walking boss point in that direction." (R., Vol. 1, 21).

The only testimony with respect to lighting was furnished by the injured longshoreman, Campbell, the assistant walking-boss, Glavanich, and an attorney for Waterman, Lester H. Clark, who investigated the accident shortly after it happened. Of these, only Campbell was on the lower 'tween deck at the time of his accident. Glavanich went below deck when he received word of the injury (R., Ex. 32, 12, 58).

The accident occurred on January 26, 1961, at 4:05 P. M. (R., Ex. 32, 7, 8; Ex. 7). Campbell was a member of a gang assigned to uncover the No. 3 aft hatch and begin a loading operation in the hold (R., Ex. 32, 5). When the after sections of the deck level and upper 'tween deck hatch squares had been removed (R., Ex. 32, 8, 10), Campbell and other members of his gang descended to the lower 'tween deck (R., Ex. 3, 13, 17).

Their purpose was to assist in removing the covers from two aft deep tanks in the hold (R., Vol. 2, 7-10, R., Ex. 3, 24, 25, R., Ex. 32, 10, 33-45).

Campbell testified that one hatch light was rigged on the inshore side of the hatch opening. It was suspended on a cord from the main deck level, and had a large field attached (R., Ex. 3, 13-16). Campbell could not remember how high the light was positioned, whether at the main deck level or below the 'tween deck level (*id*, 16). He recollected that it was "more to the top", but was unable to give any answer when asked what this meant (*id*, 16). He testified that some areas of the lower 'tween deck were dim, but not dark, without specifying any specific areas (*id*, 18). He further testified that there was "some light" in the lower 'tween deck space, and "guessed" that it was from the hatch light (*id*, 17).

Campbell appears to have had no recollection whether he did or did not look at the hatch boards in the lower 'tween deck area before he started to work. It was usual to look around an area before working and Campbell testified that he did look (*id*, 25, 26) but he said:

"I couldn't say that I looked all through." (*id*, 26)

He could not recall whether he had "walked around or just stood in one place and looked." (*id*, 26). There was also testimony as follows:

"Q. Well, did you look around the area at all to see what was in this lower 'tween deck when you first got down there?

MISS REDLAND: Do you mean looking in



the wings or what?

MR. CLARK: Looking generally around the whole area of this whole 'tween deck to see what was in there and what was not in there?

THE WITNESS: I can't recall that." (*id*, 23)

Campbell did testify as follows:

"Well, I looked as far as I could see; as far as I could see, they [the hatch boards] was on. I thought they was on and that is all I can remember. (*id* 23)."

Glavanich, the assistant walking-boss, went down to the lower 'tween deck space shortly after the accident (R., Ex. 32, 7). He found a single hatch light, which was lying on one of the tank covers (*id*, 11, 25, 26). Since this was not the position of the light as described by Campbell, one may infer that it had been moved by a workman after the accident. The light was burning, and the reflector was turned up to provide a broad field of illumination (*id*, 26).

Glavanich, who had twelve years' experience as a walking boss and thirty years' experience as a stevedore (*id*, 4), testified repeatedly that one hatch light of the kind used, if properly suspended, plus daylight filtering through the hatch, would give adequate lighting under the conditions existing at the time of the accident (*id*, 15, 16, 27, 28, 29, 30, 31, 32, 40). Since Glavanich was not in the lower 'tween deck area at the time of the accident, he could not testify that the rigging of the light was proper at that time (*id*, 31, 58).

An accident report which Glavanich prepared from

notes made shortly after the occurrence recites that Campbell was injured while “. . . walking around unlighted L/T/Deck” (R., Ex. 7, Ex. 32, 7, 8). However, Glavanich knew only what was told to him by the gang members (R., Ex. 32, 58). As noted above, Campbell testified that the lower ’tween deck was lighted.

The testimony given by Waterman’s attorney, Mr. Clark, added nothing to that of Campbell and Glavanich. He stated that there was one cargo light in the lower ’tween deck space, which had been moved to facilitate Campbell’s removal from the area (R., Tr. 5, 12).

The testimony of Campbell, Glavanich and Clark most certainly does not *compel* a finding that Matson failed to light the floor hatch area of the lower ’tween deck space properly. Neither does it prove, to the contrary, that the hatch area was adequately lighted. Campbell’s memory proved faulty. The testimony of other members of the gang working in the ’tween deck area was not preserved, or, if preserved, was not introduced at the trial of this case. The fairest summary of the evidence is that it establishes nothing with respect to adequacy of lighting. A failure of proof however, defeats any recovery by Waterman against Matson since Waterman had the burden of establishing that illumination of the ’tween deck space was insufficient.

**C. The Record Supports a Finding that Inadequate Lighting Did Not Contribute to Campbell’s Injury.**

Negligence does not exist apart from cause and effect. *The Chester Valley*, 5th Cir., 110 F.2d 592

(1940). Even if the record demanded a finding that illumination of the 'tween deck space was inadequate, this Court should affirm the district court judgment unless it can affirmatively say that Judge Kilkenney committed "clear error" in holding that inadequate lighting did not contribute to Campbell's accident.

The testimony either supports the challenged finding of Judge Kilkenney, or at worst, is neutral upon an issue which Waterman had the burden of establishing by a preponderance of the evidence.

The only testimony concerning the role poor lighting might have played in the accident came from Campbell himself. As we have already seen, the workman had only the sketchiest recollection of the events preceding his accident. Campbell conceded that the 'tween deck space was not in darkness; although some areas were dim (R., Ex. 3, 17, 18). He testified that he "looked" around before starting to work (*id*, 25, 26) but the quality of this inspection is left wholly to surmise. Obviously it was not painstaking, or the missing hatch boards would have been discovered. But Campbell could not remember whether he inspected by walking around or by standing in one place; whether the inspection consisted of a quick "coup d'oeil" or a searching gaze; whether it embraced the entire area, or just a part (*id*, 23, 26). Men often look without seeing even in a well-lighted room, and this evidence constitutes a shaky foundation for an inference that Campbell failed to see the missing hatch boards because of bad lighting.

If Campbell had fallen into the hold space while

walking normally about the lower 'tween deck area, one might perhaps infer that poor lighting was a factor in his injury. But the accident did not happen in that way. Campbell's gang was on the lower 'tween deck to assist in removal of covers from the two aft deep tanks (R., Vol. 2, 7-10, Ex. 3, 24-25). The square tank covers are removed by means of a winch on the main deck. As a cover is raised, four gang members, one at each corner, steady and guide it. The approved, safe method of steadying the cover is for workmen to use "bull ropes" or "tag lines" attached to the corners. However, Campbell testified that the workmen sometimes used their hands, and he could not remember whether or not he was using a line on the occasion in question (R., Ex. 3, 33, 45-48, Ex. 32, 33-37).

Campbell was one of the men who was to help in guiding the first tank cover to be lifted. As the cover was raised, it started to swing. Campbell instinctively stepped backward to get out of the way, and fell into the opening created by the missing hatch-boards (R., Ex. 3, 35-39).

While he was at work on the tank cover, Campbell had no reason to look at the hatch floor, and was in fact facing away from it. Accordingly, an inference that inadequate lighting contributed to the accident would have to be based solely upon Campbell's failure to discover the missing hatchboards during his initial inspection of the lower 'tween deck space. The evidence concerning this inspection was, as we have seen, vague and inadequate.

## CONCLUSION

Waterman failed to sustain its burden of proving that the lower 'tween deck was inadequately illuminated at the time of Campbell's accident. Even had the record required a finding that lighting was inadequate, the district court judgment should be affirmed. Judge Kilkeny's finding (R., Vol. 1, 22) that "lack of adequate lighting was not a causative factor in the workman's fall and resulting injuries" and his finding that Brady's negligence alone caused the accident, were not "clearly erroneous", and constituted in fact a correct analysis of the record before the court.

RAYMOND J. CONBOY  
WILLIAM F. THOMAS  
HOLLISTER & THOMAS

Proctors for Appellee  
Matson Terminals, Inc.



## APPENDIX OF EXHIBITS

All references are to Volume 2 of the Record  
unless otherwise specified.

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**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND J. CONBOY, Attorney

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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BRADY-HAMILTON STEVEDORE CO.,  
a corporation,

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v.

WATERMAN STEAMSHIP CORP.,

*Appellee,*

WATERMAN STEAMSHIP CORP.,

*Appellant,*

v.

MATSON TERMINALS, INC.,  
a corporation,

*Appellee.*

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**BRIEF OF WATERMAN STEAMSHIP CORP.**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

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**United States**  
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v.

WATERMAN STEAMSHIP CORP.,

*Appellee,*

WATERMAN STEAMSHIP CORP.,

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MATSON TERMINALS, INC.,  
a corporation,

*Appellee.*

---

**BRIEF OF WATERMAN STEAMSHIP CORP.**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**JURISDICTION**

The Court's jurisdiction of this appeal is based upon the facts and statutes set forth in appellant Brady-Hamilton Stevedore Co.'s (Brady's) brief at pages 1-2. As noted, the trial court held Brady liable as indemnitor

but dismissed the suit against Matson Terminals, Inc. (Matson).

On May 28, 1965, after service of Brady's Notice of Appeal, Waterman Steamship Corp. (Waterman) filed its protective Notice of Appeal against Matson (R., Vol. 1, 22) thereby giving the Court jurisdiction with respect to the same. 28 U.S.C.A. §§ 1291, 2107.

### **STATEMENT OF THE CASE**

Brady's outline statement of the case (Ap. Br. 2-4) is generally correct and coincides with Judge Kilkenney's factual summary in his opinion (R., Vol. 1, 18-19).

Additional evidentiary facts which are also relevant and further support the District Court's decree are referred to herein under the section captioned "Argument."

### **SPECIFICATION OF ERROR ON WATERMAN'S APPEAL AGAINST MATSON**

The District Court erred in failing to find Matson equally liable with its correspondent Brady on the ground that it breached its express and implied contractual obligation as a master stevedore. In particular, the court below erred in finding that the lack of adequate lighting in the work area was not a causative factor in the accident and injury to longshoreman B. T. Campbell. The court further erred in failing to decree that Matson was equally liable with Brady to indemnify Wa-

terman either because of breaching its implied obligation to perform stevedoring services in a workmanlike manner, or because its negligent conduct was a concurrent cause of the accident for which Matson became liable pursuant to the express indemnity agreement in its written stevedoring contract (R., Ex. 31).

### SUMMARY OF ARGUMENT

1. There were more than sufficient facts brought out in the uncontroverted evidence and exhibits adduced at trial to support the lower court's conclusion that:

“The weight of substantial evidence and the inferences to be drawn therefrom, compels a finding that Brady negligently failed to place the hatch boards in place and such failure rendered the vessel unseaworthy.” (R., Vol. 1, 20).

and its consequent Decree (R., Vol. 1, 24) requiring Brady to indemnify Waterman.

2. When the vessel arrived at Oakland, Matson allowed its men to commence working in an area which was inadequately lighted and longshoreman Campbell fell into an open hole shortly thereafter. Such conduct on the part of a stevedore employer was a breach of its obligation to perform services in a competent and workmanlike fashion and also constituted negligence which was a “concurrent cause” of the accident for which Matson is liable to indemnify Waterman under the written stevedoring contract.

## ARGUMENT

### A. Liability of Brady-Hamilton Stevedore Co.

#### Brady's Appeal Limited to One Challenged Finding

Brady's "Specification of Error" (Ap. Br. 4) does not comply with Rule 18.2(d) of this Court's rules in that it fails to particularize in any manner wherein the Findings of Fact or Conclusions of Law of the trial judge are alleged to be erroneous. Nevertheless, the specific point of which appellant complains may be found in the opening paragraph of its "Argument":

"\* \* \* Brady's sole question on appeal is whether there was substantial evidence in support of the court's Finding that Brady failed to place the missing hatchboards." (Ap. Br. 5).

Thus, there is no dispute that the absence of hatchboards in a hatch opening over which longshoremen were required to work constituted an unseaworthy condition, *Pope & Talbot v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Lahde v. Soc. Armadora Del Norte*, 9th Cir., 220 F.2d 357 (1955); nor does appellant challenge that finding by the trial court. Furthermore, both defendants have conceded that Waterman's settlement of the longshoreman's personal injury action against it was \$4,000, together with its costs of defense totaling \$1,030.33, were reasonable and that their total constitutes the correct amount of damages if the shipowner is otherwise entitled to recover against one or both stevedores.



The only question on Brady's appeal, therefore, is the sufficiency of evidence to support the single challenged finding.

### **Test Is Whether Trial Court's Findings Are Clearly Erroneous**

In an admiralty appeal of this kind the standard is whether a disputed finding of fact by the trial court is so unsupported by the evidence as to be clearly erroneous. Upon reviewing the entire evidence, the appellate court must be "left with the definite and firm conviction that a mistake has been committed by the Court below", *McAllister v. United States*, 348 U.S. 19, 20, 99 L. Ed. 20, 75 S. Ct. 6 (1954), or else it should affirm.

This Court has consistently adhered to the foregoing rule. As stated in *Pacific Towboat Co. v. States Marine Corporation of Delaware*, 9th Cir., 276 F.2d 745 (1960):

"In the *McAllister* case the Supreme Court dealt specifically with a 'finding of fact' that the master of the ship was negligent. It was with respect to this finding that the court there held that 'no greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure.' Since that decision this court has uniformly regarded determinations as to negligence made in admiralty cases as findings of fact which are not to be overturned unless clearly erroneous. \* \* \*" 276 F.2d at 752.

See also, *Furness, Withy & Co. v. Carter*, 9th Cir., 281 F.2d 264, 266 (1960) ("To reverse, we must be convinced

that the lower court's findings run clearly counter to that preponderance" [of the evidence].)

A shipowner's suit to recover indemnity from master stevedores for breach of their contractual obligation is no different from any other admiralty cause where libellant has prevailed below. The trial court's findings of fact which support its decree allowing indemnity are entitled to withstand challenge on appeal unless clearly erroneous and appellant has the burden of proof in so showing. *W. J. Jones & Son, Inc. v. Calmar Steamship Corp.*, 9th Cir., 284 F.2d 499 (1960).

### **Finding Fully Supported By the Evidence**

The judge believed that the weight of substantial evidence and inferences to be drawn therefrom "compels a finding that Brady negligently failed to place the hatch boards in place" (R., Vol. 1, 20). The basis for that finding consists of the following evidence:

- (a) The No. 3 hatch aboard the SS DE SOTO consists of three levels: An upper 'tween deck space; a lower 'tween deck space; and a lower hold space which is divided into a forward hold and two aft deep tanks. The tanks are in a side-by-side position (R., Vol. 2, 7-10).
- (b) On January 24, 1961, Brady had two thirteen-man gangs working in No. 3. One of the gangs worked in the forward lower hold area "a/o" (all over) stowing paper, peas, soap, ingots, plywood and canned goods (R., Ex. 5).

- (c) The two missing hatchboards which caused the accident of January 26, 1961 were found in the square giving access to the No. 3 lower hold area (R., Exs. 32-1, 2, 3, 4) in which Brady's longshoremen had completed their work and were supposed to have covered up immediately prior to the vessel's sailing from Portland two days before. Both the Portland loading records (R., Ex. 5) and the vessel's log (R., Ex. 6) show that covering up work was undertaken at No. 3 hatch between 1630 (4:30) and 1645 (4:45 p.m.) hours on January 24, 1961, and that all stevedores knocked off and were ashore shortly thereafter. A tug came alongside and the vessel left Portland at 1800 hours (6:00 p.m.).
- (d) Pictures in evidence (R., Exs. 32-2 and 32-3) show that it would be easy for longshoremen leaving the lower hold by the forward ladder to overlook the two missing boards at the after end because of the load of dunnage which was lying on top of the after hatch section. There is also evidence that it would have been difficult work to replace the boards and probably would have required moving part of the dunnage with several men working together (Dep. of Glavanich, Ex. 32, 48-49, 60-61).
- (e) Once the No. 3 hatch was sealed by longshoremen at the main deck level there was no other way in. There were no escape ladders or other means of access which are sometimes found on various merchant vessels (R., Vol. 2, 5-6). Brady does not deny this (Ap. Br. 8). Nevertheless, appellant surmises

that its employees had replaced the missing hatch boards, although it offered no evidence thereof, and that "one or more members of the crew" could have entered the hatch "to examine the stowage" and could have done so "simply by laying back the tarp on one corner and removing two hatch boards to expose the ladder." (Ap. Br. 7, 8). There is no evidence in the record to support such supposition and the log entries (R., Ex. 6) record no such cargo inspection.

The shipowner employed both a supercargo and checkers (R., Ex. 5) to make sure cargo was safely stowed while it was being loaded and the likelihood of a crew member or mate doing the same thing during an uneventful two-day coastwise voyage is improbable. Furthermore, to get down into the lower hold area during the voyage, a man would have to first unbatten the hatches, uncover the protective tarpaulin, take out the hatch boards at the main deck level, the upper 'tween deck and the lower 'tween deck level.

Brady's entire proposition rests upon the assumption that its own employees put the hatchboards in place when they finished work. It failed, though, to produce any of these Portland longshoremen or its supervisory personnel to so testify. Appellant is thus hardly in a position to fault Waterman for not gathering crew members from different parts of the world four years after an accident to give negative testimony that they did not enter



a hatch area, especially when they had no occasion to be doing so, and there was no record of the hatch being opened between Portland and Oakland.

The trial judge surely took the much more reasonable inference that Brady's employees neglected or were in too much of a hurry, to reinsert the two difficult boards on their way out of the lower hold at 4:30 p.m. on January 24, and that no one entered the hatch after it was then covered up above until Campbell and his fellow longshoremen uncovered and entered the area at Oakland on the afternoon of the 26th.

- (f) What the log does show is that members of the crew took the *battens* off the hatches upon arrival at Oakland but that *uncovering* was done by California longshoremen, the same being within the jurisdiction of longshoremen's work under the labor agreements (R., Ex. 6).

Matson Terminals, the Oakland stevedore, came aboard at 1:20 p.m. on January 26, and its longshoremen rigged cargo gear and rain tents at various hatches. The first loading operation commenced at 2:40 p.m. at the No. 2 hatch. The assistant walking boss Glavanich was in charge of the No. 3 hatch on the day of the accident (R., Ex. 32, 6, 52). Sometime after 3:30 p.m. he was present on the main deck when Matson's men uncovered the after section of No. 3 at that level, then went down to the upper 'tween deck level where they again uncovered the after section of the hatch square and



proceeded down to the lower 'tween deck level. They had just begun to remove the tank tops when the accident involving Campbell occurred at 4:05 p.m. (*id.* 8, 10). It was the first time that anybody from Matson had been down to that deck level. (*id.* 16, 17). Matson did no work in the lower hold either before or after the accident (*id.* 57) and its men were down there to uncover the tank tops preparatory to loading in the after deep tank cargo space, not the forward lower hold space (*id.* 33, 40).

Based upon the foregoing evidence, the court below drew the most reasonable factual inference, to-wit: That the employees of Brady-Hamilton Stevedore Co. carelessly failed to replace two hatchboards in the aft section of the square of No. 3 lower 'tween deck when they completed work aboard the vessel on January 24, 1961, and so breached the stevedore's warranty obligation to the shipowner. Such breach was a proximate cause of Campbell's accident when the hatch was reopened less than two days later and Brady was properly held liable as indemnitor.

**B. Liability of Matson Terminals, Inc.  
Lighting Inadequate When  
Accident Occurred**

The trial court held that the evidence "probably supports a finding that Matson failed to properly light the area in which the longshoremen were working." (R. Vol. 1, 21). Since the Opinion, together with various pretrial

admissions, were designated by the court as its findings and conclusions, no more specific statement was made.

The court's additional comment that the evidence in support of inadequate lighting was "sketchy and indefinite" is somewhat puzzling in view of the fact that Matson's own accident report states:

"IN WALKING AROUND UNLIGHTED L/T/DECK AREA, HE STEPPED INTO UNCOVERED PORTION OF SQUARE. HE CAUGHT HIMSELF, THUS BREAKING THE FALL, DANGLING FROM L/T/DECK." (R., Ex. 7)

Mr. John Glavanich was Matson's assistant walking boss in charge of No. 3 hatch on the day of the accident and prepared the accident report. (R., Vol. 2, 13). He testified that only one section at the main and upper 'tween deck levels had been uncovered, or roughly one-quarter of each opening (Dep. of Glavanich, R., Ex. 32, 10, 24, 50, 54-55); that the day was "hazy" (*id.* 11); and that the lighting conditions in the area where Campbell fell were "dim" (*ibid.*). (The vessel's log (R., Ex. 6) reported rainy weather.)

Although Glavanich testified on direct examination by Matson's counsel that the light "was sufficiently adequate to find your way around, so to speak" (R., Ex. 32, 15), he later qualified the statement by testifying on cross-examination that he lacked any knowledge as to whether the light in the area was adequate at the time of the accident (*id.* 31) and, of course, his report filled out shortly after the accident characterized the area as "unlighted".

The supervisor testified that when he came down into the hold before the injured man was removed (*id.* 12, 52) he saw only one light which was lying on top of the deep tank cover, not in the correct place for the job at hand (*id.* 29). He had no knowledge as to whether the light had been suspended prior to the accident (*id.* 30) nor whether the longshoremen later hung another light in the area before proceeding to remove the tank tops (*id.* 37-38).

Glavanich's opinion that the lighting was "adequate" was "because the men could move around in that area, *and that area only*, with the illumination that was there." (emphasis supplied) When asked "what area?", he stated:

"A. 3 aft, one section.

Q. What one section of 3 aft?

A. That after section." (*id.* 32)

However, he admitted that longshoremen might have to be standing in the forward part of the deck area over the lower hold hatch in the course of removing the tank tops (*id.* 45-46); that the job to be done included swinging the tank top completely clear of the opening and into the wing area of the lower 'tween deck (*id.* 42); that the overhead was "under 7 feet" high at that level (*id.* 39) sharply limiting the area of light cast; and that men removing tank tops might be as much as 28 feet apart (*id.* 37) but in any event would want to be standing "well forward of the tank top cover" when the load was swung (*id.* 45). The missing hatchboards left an opening 9 to 9½ feet long (*id.* 42) which at its closest point was 5 feet from the tank top (*id.* 41).

Glavanich also agreed that the available daylight in the area where the men were working was a lot less than most any other time of the year and under most any other conditions in the hold and testified that it was not possible to rely on daylight alone (*id.* 50). As stated by Brady's counsel, "the shades of night were falling fast" around 4:00 p.m. on an inclement January 26th in Oakland, and Mr. Glavanich concurred (*id.* 51).

The failure to properly light a work area constitutes negligence and a breach of the stevedore's obligation to perform its services in a workmanlike fashion. Where such conduct brings a previously existing unseaworthy condition into play resulting in an accident and injury, the stevedoring company is liable as indemnitor. *Schiavone Terminal, Inc. v. Bozzo*, 1st Cir., 289 F.2d 735 (1961); *Crumady v. Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L.Ed. 2d 413 (1959).

### **Court Erred in Holding Bad Lighting Irrelevant**

The trial judge found that if there was lack of light it  
 " \* \* \* was not a causative factor in the workman's fall and resulting injuries. It is my finding that the sole and only cause of such injuries was the negligence of Brady in failing to properly replace the hatchboards and the unseaworthy condition resulting therefrom." (R., Vol. 1, 22)

In this case, Matson was performing its stevedoring work aboard the vessel pursuant to a written contract with Waterman (R., Ex. 31). The contract contains an express indemnity agreement in which Matson agreed



to hold the shipowner harmless from any personal injury claims which resulted, among other things, from the "primary or concurrent" negligence of the stevedoring company, its agents or employees. In addition, Matson impliedly agreed to perform its stevedoring services in a safe and workmanlike manner and not expose the vessel or her owners to suits by injured longshoremen. *Italia Societa per Azioni di Navigazioni v. Oregon Stevedoring Co.*, 9th Cir., 336 F.2d 124 (1964). Hence, Matson is liable to indemnify the shipowner for longshoremen's personal injury claims if the former's negligent conduct was either the principal or merely a contributing cause of the accident.

On this appeal, the question with respect to Matson's liability is identical to that involved in Brady's appeal: Was the court's finding that poor lighting had nothing to do with Campbell's fall into the opening created by the missing hatch boards clearly erroneous? If so, the finding should be rejected and the decree of dismissal against Matson reversed.

### **Sufficient Lights Would Have Prevented Accident**

Campbell, the man who fell, testified that some of the lower 'tween deck area was in darkness (Dep. of Campbell, R., Ex. 3, 18), or at least dim, and when he looked around after coming down the ladder, the hatch square opening to the forward lower hold appeared fully covered (*id.* 19, 26), with a load of dunnage lying on top of the boards (*id.* 29-30). Campbell and the other men had only been in the area a short time before the



accident occurred. It was not until he fell into the opening a few minutes later while assisting in removal of the tank tops that he became painfully aware that several hatch boards were missing in the lower hold square (*id.* 22). Obviously, if adequate lighting to cover the work area had been provided before work actually commenced and the men became absorbed in their task, the dangerous condition would have been noticed. The fact that Campbell actually looked at the area but did not see the opening must be attributable, at least in part, to the poor illumination.

Mr. Glavanich, the stevedore's supervisor, testified that Matson had made no check of the work area prior to sending a gang into the hold, nor did any member of the gang have the duty of checking the area for hazardous conditions before work commenced (Ex. 32, 46-47). The stevedore relied upon the workmen themselves to call attention to any hazardous condition (*id.* 46), and if longshoremen complained to the supervisor about anything unsafe, measures would then be taken to correct the condition (*id.* 47, 48).

The combination of Campbell's testimony, the admissions of assistant walking boss Glavanich, and Matson's own accident report which refers to the "Unlighted L/T/Deck Area" as the reason the man stepped into the open hole, casts great doubt upon the court's finding that lack of proper lighting "was not a causative factor in the workman's fall." (R., Vol. 1, 22). It is respectfully submitted that such finding is contrary to the preponderance of the evidence, is substantially unsupported by the record, and should be rejected. Cf.

*Furness, Withy & Co. v. Carter, supra; Admiral Towing Co. v. Woolen*, 9th Cir., 290 F.2d 641, 646 (1961).

No doubt the trial court concluded that employees of Brady-Hamilton Stevedore Co. who failed to replace the boards when they left the hatch at Portland on the afternoon of January 24 were the real culprits and responsibility for the resulting accident should properly rest with their employer. Even so, Matson expressly and impliedly agreed to indemnify Waterman in cases where Matson's negligent acts or omissions were a contributing cause of accidents and Matson should be held equally liable with its correspondent Brady, for failing to light the work area and thus helping bring an unseaworthy condition into play.

## CONCLUSION

Waterman Steamship Corp. has been required to pay a substantial sum by reason of an accident resulting from the conduct of appellant Brady in initially creating an unseaworthy condition aboard Waterman's vessel and the subsequent conduct of respondent Matson in bringing that condition into play. There was ample evidence that both stevedores breached their respective contractual obligations to perform the work in a safe, careful manner and not expose Waterman to liability for personal injury claims.

Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either may be held for the entire damage—not because

he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury. *Husky Refining Co. v. Barnes*, 9th Cir., 119 F.2d 715 (1941). The same rule has long prevailed in admiralty causes, *Phoenix Insurance Co. v. The Atlas*, 93 U.S. 302, 23 L. Ed. 863 (1876); *The Samovar*, N.D. Cal., 72 F. Sup. 574, 589 (1947), and has been applied in cases identical to the one at bar, *Fappiano v. United States*, S.D. N.Y., 1959 A.M.C. 197 (1958).

It is respectfully submitted that the decree of the court below requiring Brady-Hamilton Stevedore Co. to indemnify Waterman should be affirmed and the decree dismissing Waterman's suit against Matson Terminals, Inc. should be reversed with directions to enter judgment in favor of Waterman.

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KRAUSE, LINDSAY & NAHSTOLL

Proctors for Waterman Steamship Corp.

## APPENDIX OF EXHIBITS

All references are to Volume 2 of the Record  
unless otherwise specified.

Exhibit No.	Description	Identified	Received
1	Pleadings in <i>Campbell v. Waterman Steamship Co.</i> .....	17-18	18
2	Release signed by B. T. Campbell .....	29	29
3	Deposition of Campbell .....	24	25
5	Portland loading records for January 24, 1961 (erroneously identified in tran- script as "Court records of Brady- Hamilton") .....	28	28
6	Log of SS DE SOTO .....	28	28
7	Accident report, Matson Terminals, Inc.	13	13
8	Letter of September 13, 1963, Matson to Waterman .....	23	23
31	Stevedoring contract between Waterman and Matson .....	Pretrial Order	Vol. 1 38 (Order of Dec. 30, 1964)
32	Deposition of Glavanich and Deposition exhibits .....	31	34
32-1,2,3,4	Photographs of Accident Scene....	6-7	7

## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JERARD S. WEIGLER, Attorney















